Petition

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81-913

No.

In the Supreme Court of the United States

October Term, 1981

MICHAEL VALERIO, et al.,
Petitioners,

vs.

BOISE CASCADE CORPORATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

The questions presented are:

1. Must a trial court, in a new action, grant relief from a settlement of a prior class action where (a) the class was certified for settlement purposes only with no court determination that any of the Rule 23 or constitutional requirements had been met, and (b) the attorneys for the class secretly had rejected a higher settlement offer which did not specify any amount for attorneys' fees and costs in preference for a lower one which did?

2. If not, must the trial court at least allow discovery and a usual hearing on the merits in the new action before refusing to grant relief?

3. Should the use of the "settlement class" be either severely limited or prohibited entirely?

PARTIES

Petitioners Michael Valerio and Yung Hao Chang were appellants in the Ninth Circuit and plaintiffs in the district court. They commenced this action for themselves and on behalf of approximately 44,000 similarly situated persons, all of whom had been members of the "settlement class" in a prior class action. The trial court never ruled upon petitioners' motion to certify the class in this action. CT 112 (Doc. No. 13).

Appellees in the Ninth Circuit and defendants in the trial court were:

The Boise entities:

Boise Cascade Corporation
Boise Cascade Home and Land Corporation
Boise Cascade Recreation Communities Corporation of Delaware
Boise Cascade Properties, Inc.
Boise Cascade Credit Corporation

The attorneys:

Lovitt and Hannan
Goldstein, Barceloux and Goldstein
Cotchett & Hutchinson
Breen, Young, Whitehead & Hoy
Becklund, Siner, Taketa & Salle
Barfield, Barfield, Dryden & Ruane
Stark, Stewart, Simon & Sparrowe

John J. Murray
Frederick E. Watson
Martin Titcomb
Thomas Elke

Attorney General of the State of California, acting through the following attorneys who are not parties hereto:
Jay S. Linderman
Evelle Younger

Other entities:

Hidden Valley Lake Properties, Inc., aka Hidden Valley, Inc.
Hidden Valley Lake Association and Stonehouse Mutual Water Company, and their directors:

Robbieburr Burger
Jack Horner
Fred Hearn
Wayne Ray
Orin Percy
Kenneth Carey
Pine Mountain Lake Association

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No.

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MICHAEL VALERIO, et al.,
Petitioners,

VS.

BOISE CASCADE CORPORATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioners Michael Valerio and Yung Hao Chang respectfully pray that a Writ of Certiorari issue to review the decision rendered by the Ninth Circuit Court of Appeals on May 18, 1981, rehearing denied on July 15, 1981.

OPINIONS BELOW

The opinion of the Ninth Circuit (App. A) is reported at 645 F.2d 699 (9th Cir. 1981). The opinions of the trial court (App. B and C) are reported at 80 F.R.D. 626 (N.D. Cal. 1978). The order of the

Ninth Circuit denying rehearing (App. D) is not reported.

JURISDICTION

The opinion of the Ninth Circuit was filed on May 18, 1981. That court's order denying a rehearing was filed on July 15, 1981. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves the following:

1. The Fifth Amendment to the Constitution of the United States, which provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law . . . ;"

2. The inherent jurisdiction of federal courts to set aside judgments which have been obtained by fraud on the court. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997 (1944); and

3. Rules 23, 26 and 56 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This class action seeks to set aside the settlement and judgment in a prior class action, *J. Bruce McCubbrey, et al.*, v. *Boise Cascade Corporation, et al.*, U.S.D.C., N.D. Cal., No. C-72-470 RFP, primarily because it was procured by fraud on the court. At the core of numerous misrepresentations to the court in *McCubbrey*[1] by the attorneys for the class therein[2] was their secret rejection of a higher settlement offer which did not specify any amount for attorneys' fees and costs in preference for a lower one which "locked in" over $2.5 million therefor.[3] App. E, pp. 4-5, 8-9; App. F, pp. 20-21, 69-70.

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[1] The primary reasons utilized by the attorneys to justify to the court their proposed settlement in *McCubbrey* were (1) the inability of Boise "to pay a substantial judgment" (CT 2491 [7:11-13 of Plaintiffs' Application For . . . Attorneys' Fees, Doc. No. 73]) and (2) that had the litigation proceeded, "when it was all over nobody would have gotten anything." CT 848 (RT March 9, 1973, 19:9, attached as an exhibit to Doc. No. 57). *See, also,* CT 248:9-18; 249:9-23; 258:13-20; 262:4-10; 278:24-279:12; 2491 [6:4-24; 8:1-28 of Plaintiffs' Application For . . . Attorneys' Fees, Doc. No. 73]. Judge Peckham acknowledged in this action that he had approved the settlement in *McCubbrey* primarily because of these representations. 5 RT (July 15, 1977) 162:8-11. Plaintiffs' evidence in this action that these representations in *McCubbrey* had been false raised triable issues of fact here. See, *infra,* fn. 4 at p. 5.

[2] They are the attorney defendants in this action.

[3] Boise made a settlement offer in *McCubbrey* dated October 20, 1972, which provided for a maximum payout of $74,475,000, but no specified amount in attorneys' fees and costs. CT 1858 (Exhibit I of Doc. No. 164); App. E hereto, pp. 4-5, 8-9. The class attorneys responded by negotiating an agreement which provided for a maximum payout of only $63,922,500. CT 2792-2795, ¶¶ E-1 through E-4-b and I-2; App. F hereto, pp. 14-21, 69-70. This constituted a substantial reduction in each of the three major components of the settlement, *i.e.,* restitution to the class, and improvements and project administration in connection with the real property which Boise had sold to the class. However, it also required that Boise not only agree to pay, but agree to recommend to the court that Boise pay, the additional sum of over $2.5 million in attorneys' fees and costs. CT 2792-2795, ¶¶ E-1 through E-4-b and I-2; App. F hereto, pp .14-21, 69-70. But although plaintiffs introduced Boise's October, 1972, offer into evidence in this action (CT 1773, 1806, *et seq.*), which offer theretofore never had been disclosed to any court or class member, it was studiously ignored, not only by the trial court herein, but by the appellate court as well.

Defendants made three arguments to the Ninth Circuit concerning this misconduct: (1) there was no reduction in cash benefits to the class because the *total* of the restitution plus attorneys' fees was higher in the ultimate settlement than in the October, 1972, proposal, (2) the reduction in non-cash benefits was occasioned solely by Boise's actual provision thereof during the course of the settlement negotiations, and (3) the October, 1972, proposal was not really a settlement offer at all. Boise Br., 26-28; Ferelle Br., 37-40; Lewis Br., 35-36. (These citations are to briefs in the Ninth Circuit.)

The second and third contentions are easily disposed of, the latter by a simple reading of the proposal itself (CT 1858 [Exhibit I of Doc. No. 164]; App. E hereto) and the former by even a cursory examination of the respective figures. The record contains three sets of figures for the settlement and its components, the first two being those which were proposed by Boise in June, 1972 (CT 2792-2793, Settlement Agreement, ¶¶ E-1, E-2; App. F hereto, pp. 14-17), and October, 1972 (CT 1858, Exhibit I of Doc. No. 164; App. E hereto, pp. 4-5), respectively, and the third being those which actually were employed in the settlement as approved (CT 2792-2795, Settlement Agreement, ¶¶ E-1 through E-4-b and I-2; App. F hereto, pp. 14-21, 69-70):

SETTLEMENT FIGURES

(As Proposed and as Adopted)
(Millions of Dollars)

	June, 1972	*October, 1972*	*Final*
A. Restitution		31.975	30.
B. Improvements	18.5	23.	14.
C. Administration	21.5	19.5	17.4
D. Attorneys' Fees	—	—	2.522
Total		74.475	63.922

Defendants argue (without *any* evidentiary support) that the reductions in categories B and C were disclosed to the court and merely represent expenditures which Boise had made during the pendency of settlement negotiations. Boise Br., 27-28; Farella Br., 38; Lewis Br., 36. With respect to category B, i.e., "improvements," however, the figures indicate that the October proposal contained $4.5 million *more* than did the one in June, thus demonstrating that the differences among the various figures cannot be accounted for as being mere reductions over time as "improvements" were made. Boise claims that all of the improvement figures are for identical amenities, namely, those which are identified in the Public Reports of the California Department of Real Estate. Boise Br., 28. But the settlement agreement identifies other proposed "improvements" as well. CT 2792-2793, ¶ E-1; App. F hereto, pp. 14-16. Furthermore, there is no evidence that these "improvements" remained the same. Moreover, there is no evidence to support the assertion in the Lewis brief at p. 36 and the Farella brief at page 38 that Boise actually expended *any* money between June and November, 1972, either for "improvements" or for "project administration," much less that it expended the specific amounts for which these briefs contend. Since no accounting for these sums was filed with the court, there is no evidence that Boise ever expended any of the moneys which are referred to in either categories B *or* C.

The first of defendants' above-mentioned contentions, i.e., that there was no reduction in cash benefits to the class, is the most incriminating argument of the three. Since, as is shown above, the *total* of categories A and D ("restitution" and "attorneys' fees") is actually more in the final settlement than in the October, 1972, proposal, defendants argue that the attorneys breached no duty to the class. However, defendants carefully refrain from even suggesting that the restitution fund was not reduced, and the figures above demonstrate that that reduction was in the amount of $1.975 million.

It is true, of course, that if defendant attorneys had approved, and divulged to the court, the October, 1972, proposal, the court undoubtedly would have awarded fees to the attorneys out of the $31.975 million restitution fund for which that proposal provided. These fees might have amounted either to more or to less than the $2.522 million sum which Boise ultimately offered to pay and the attorneys agreed to take. But that contract was born in and nourished by a conflict of interest. The attorneys placed themselves in a role which was adverse to their clients by negotiating for the payment of their fees from the restitution fund, which otherwise would have been available in its entirety for the benefit of their clients. *See, infra, argument I.*

After negotiating away proffered benefits for the class in *McCubbrey* in order to secure a personal advantage for themselves, defendant attorneys obtained the court's certification of the class (for settlement purposes only) and its approval of the settlement which was more favorable to them by:

a. failing to disclose to the court or class the earlier settlement offer (this failure is undisputed);

b. falsely representing to the court that Boise could pay no more money (App. I and J);[4]

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[4] See, *supra*, fn. 1. Judge Peckham concluded, on summary judgment in this case, that Boise might have gone bankrupt if he had not approved the *McCubbrey* settlement because Boise's lenders might have "accelerated the debts owed to them." CT 2166:2-13; App. C hereto, pp. 34-35. Plaintiffs conclusively demonstrated in this case, however, that Boise's major lenders had restructured their loans two months earlier, so that there was, at the time when the settlement was approved, no possibility of acceleration. CT 1898 (Amendment Agreements filed December 8, 1977, as Doc. No. 173); 8 RT (December 5, 1977) 39:13-40:22. In any event, the critical representation was not that Boise might file a technical bankruptcy proceeding, but that Boise lacked an ability to pay the claims of the class, which is an entirely different matter. The uncontroverted evidence from plaintiffs' insolvency expert in this case is that (CT 1858 [5:28-6:12 of Exhibit D of Doc. No. 164]; App. I hereto, pp. 13-14):

> ". . . even in the worst of circumstances, that is, orderly liquidation in straight bankruptcy (the most unlikely situation), there would appear to be sufficient assets to meet the maximum claim of the class action plaintiffs of $350,000,000.00. . . .
>
> "We, therefore, conclude that even if a proceeding under the Bankruptcy Act were filed in mid-1973 by Boise Cascade Corporation, under the assumptions made herein, that filing would be immaterial insofar as the collectibility of a class action judgment is concerned."

The affidavit of Edward Cleary, Boise's treasurer, which is attached to the trial court's opinion in this case (and which is the *only* evidence that even allegedly supported the fairness of the *McCubbrey* settlement), refers to Boise's debts but *not* to its assets. CT 2203-2209; App. A of App. C hereto. That affidavit, like the trial court's' opinion, omits from consideration such items as $370 million in cash which Boise received in late 1972 and early 1973 from the sale of assets (CT 1026 [page 1 of Exhibit B of Doc. No. 107]; App. J hereto, p. 3) and its then book equity of $666 million (*id.* at 51; App. I hereto, p. 8). These figures were, of course, never presented to the court in *McCubbrey*.

Boise and several of the attorney defendants, obviously aware of their inability to prove their representation in *McCubbrey* that Boise could have paid no more, argued in this action that they never had urged the parent Boise's financial distress, but rather only that its subsidiary (which was the actual seller of the realty to the class) was unable to pay more. Farella Br., pp. 34-35; CT 1105:7-11; 1106:29-1107:1; 2242. This contention, however, is contradicted, not only by overwhelming evidence (CT 1237:22-1239:29; 1239:30-1243:7; 1784:28-1785:12; 1858 [Exhibit X of Doc. No. 164]), but by other defendants (CT 1602:8-17; 1604:30-1607:7) and the trial court itself (CT 2166:2-13; 2154:13-16; App. C hereto, pp. 34-35, 5-6).

c. convincing an attorney who had rejected the settlement to support it by making an undisclosed payment to him of $45,000 (App. G and H);[5]

d. concealing from the court and class the attorneys' beliefs that they would be unable to obtain Rule 23 certification of the class;[6] and

e. failing to disclose in the notice to the class that the proposed agreement was a "distress" settlement.[7]

The trial court approved the settlement in *Mccubbrey* on May 15, 1973 (CT 318:23-24), and settlement funds were disbursed to, *inter alia*, the named plaintiffs herein (both of whom were unnamed members of the "settlement class" in *McCubbrey*) in the autumn of 1973. Plaintiffs did not become aware of the manner in which the *McCubbrey* settlement had been procured until almost four years later when, in March of 1977, they contacted their present counsel, Ernest M. Thayer, concerning actions which had been brought against them to collect assessments which had been levied against the properties which they had purchased from Boise. Valerio deposition at 37:19-38:21. By happenstance, attorney Thayer had acquired a draft of the secret settlement proposal prior to this contact,[9] and he therefore instituted this action on behalf of plaintiffs and the putative members of their class (who were the members of the "settlement class" in *McCubbrey*) shortly thereafter, on May 6, 1977. CT 1.

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[5] When one of the attorneys for the *McCubbrey* class (Murray) who had been excluded from the settlement negotiations argued that the settlement would be unfair to the class (CT 1026 [Exhibit E of Third Affidavit Of Ernest M. Thayer which is attached to Doc. No. 107]; App. G hereto), Boise agreed to pay him an additional $22,500, thereby raising its commitment for attorneys' fees and costs from $2,500,000 to $2,522,500. 5 RT (July 15, 1977) 84:6-85:13. The notice to the class omitted any reference to this additional $22,500 (*ibid.*), an omission which, after plaintiffs had discovered it and had filed this lawsuit, Boise excused as an "oversight." *Id.* at 46:2-18. The settlement agreement falsely described this $22,500 as costs, not attorneys' fees. CT 2816-2817, ¶ 1-2; App. F hereto, pp. 69-70. One of the other class attorneys (Salle), who already had been included in the agreement, likewise agreed to pay Murray up to $22,500 out of Salle's negotiated fee. CT 867-869; App. H hereto. Following these clandestine agreements, of which plaintiffs learned only by chance (see, *infra*, fn. 8), Murray suddenly became silent concerning the unfairness of the settlement to the class.

[6] The attorneys for the *McCubbrey* class argued for the first time, as defendants in this action, that conflicting interests of the class members in *McCubbrey* would have prevented certification of that class for purposes of trial, and that (despite the individually viable nature of the claims therein, which claims amounted to thousands of dollars in compensatory damages each), a class *settlement* in *McCubbrey* was therefore "fair" (CT 1482:12-18):

> "Such conflicts of interests among class members, did indeed present a very serious problem as to ever obtaining court approval for the named plaintiffs to 'adequately represent' all of the subgroups, with conflicting interests, in *litigation on the merits*. Indeed, this problem of obtaining *class certification*, for *litigation on the merits*, was one of the main factors that made the *McCubbrey* settlement fair and reasonable. [Emphasis in original.]"

[7] Plaintiffs' argument to the trial and appellate courts in this action that this omission in the notice in *McCubbrey* had deprived them of due process was summarily dismissed, in misplaced reliance upon *Marshall* v. *Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977). App. A hereto, p. 5, and App. C hereto, pp. 10-14.

Almost immediately following the filing of the complaint herein, the trial court ordered a stay of all formal discovery (3 RT [July 1, 1977] 15:14-18:25), and although plaintiffs thereafter made repeated and detailed requests therefor, only defendants ever were permitted any discovery whatsoever in this action. CT 108-111; 3 RT (July 1, 1977) 21:13-22:13; Chang deposition 2:1-10; CT 371-382; CT 405-508; 4 RT (July 8, 1977) 22:22-24; 5 RT (July 15, 1977) 167:

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[9] Mr. Thayer had obtained the files of one of the *McCubbrey* class attorneys, Richard Salle, following Mr. Salle's death, when Mr. Thayer began to represent an opt-out from the *McCubbrey* class, Oscar Lemer. 8 RT (December 5, 1977) 38: 23-25; CT 1372:30-1373:4.

1-3; 207:21-208:3; CT 1026 (Third Affidavit Of Ernest M. Thayer, attached to Doc. No. 107); CT 1349-1369; CT 1445; CT 1450-1452; CT 1858 (Sixth Affidavit Of Ernest M. Thayer, 2a:10-3:5 of Exhibit A to Doc. No. 164); CT 2089-2096. The trial court also imposed a "gag" order whereby it prohibited plaintiffs even from communicating with their class members.[9] 2 RT (June 23, 1977) 24:2-8; CT 509-519; CT 690-692; CT 1450-1452.

On June 29, 1977, approximately two months after the filing of the complaint herein, Boise moved to dismiss this action (CT 113-321), and thereafter other defendants joined in that motion. CT 391-404; 597-600; 611-658; 839-847; 883-884. The trial court decided to treat these motions as being for summary judgment (5 RT [July 15, 1977] 142:13-18), following which, contrary to the provisions of Rule 56, the court denied plaintiffs *all* discovery. Despite this prohibition, however, plaintiffs nevertheless were able to tender, in opposition to the motions, *inter alia*, parts of the *McCubbrey* record, the secret settlement offer (App. E), the final settlement agreement (App. F), correspondence from an attorney who was objecting to the fairness of the settlement (App. G), correspondence confirming defendants' agreement to pay that attorney up to $45,000 in fees, which agreement thereafter silenced his opposition to the settlement (App. H), the affidavit of an expert which refuted the representation that Boise could have paid no more (App. I), and financial documents concerning Boise upon which that expert opinion was based (e.g., App. J).

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[9] Plaintiffs urged the unconstitutionality of this order both to the trial and appellate courts (CT 1349-1369; Valerio Opening Br., 12-15; Valerio Reply Br., 49, fn. 37), but both courts ignored their claim. Since then, this court has affirmed a Fifth Circuit holding that, absent a finding of need (which the court here did not make) such a gag order is an unconstitutional prior restraint on expression which is accorded First Amendment protection. *Gulf Oil Co.* v. *Bernard*, ... U.S. ...., 68 L.Ed.2d 693, 101 S.Ct. .... (1981).

The only evidence which was submitted in this action by any defendant were the affidavits of attorney Frederick Watson wherein, for the first time, it was disclosed that the attorneys for the class in *McCubbrey* had recommended the settlement because of their perceived inability to secure Rule 23 certification of the class. CT 1482:12-18; 1590:23-1597:24. This, of course, is no justification for a class settlement. Indeed, had the court in *McCubbrey* been informed that this was the class attorneys' motivation, that court would have been required to deny certification, even for settlement purposes. See, *infra*, argument III. The remaining defendants in this action relied solely upon the record of the *McCubbrey* action.[10]

After retaining defendants' motions under submission for approximately a year, the trial court held that the claims against the attorneys were time-barred because of plaintiffs' constructive "discovery" of defendants' frauds at the time, and as a result, of their receipt of small settlement checks which returned only

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[10] The only "evidence" which was submitted in that action to justify the settlement was an affidavit of the treasurer of Boise, Edward Cleary, which set forth the liabilities (but not the assets) of Boise and which was not filed until the very evening before the "fairness" hearing. CT 2203-2209; App. A of App. C hereto.

17 percent of their investments. CT 2104:3-5, 9-12; App. B, pp. 13-14. The court then branded the evidence and charges against Boise which are recited above as being "reckless," and granted summary judgment to all remaining defendants. (CT 2162:3-14; App. C, pp. 24-25. The Ninth Circuit affirmed in a terse opinion. App. A.

Neither the trial court nor the Ninth Circuit mentioned, much less discussed, the principal evidence, namely the secret settlement offer and Boise's amended loan agreements. Neither the trial court nor the Ninth Circuit mentioned, much less discussed, the propriety of certifying a class for settlement purposes only where the class members have conflicting interests, individually viable claims and a lack of sufficient commonality to justify certification for trial under Rule 23. Finally, although the district court professed to be following the ordinary rules of summary judgment, it manifestly did not do so.[11] Defendants urged for the first time, in the Ninth Circuit, that plaintiffs were not entitled to the usual hearing on the merits, or to usual discovery, because their action was one attacking a judgment which had been entered in a prior action. Boise Br. 11-13; Farella Br. 26-29. The Ninth Circuit, *sub silentio*, adopted these new, and unprecedented, rules for the conduct of such an action without addressing the question of the quality of the hearing to which plaintiffs were entitled.

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[11] The trial court acknowledged that "the allegation that the class attorneys misrepresented Boise Cascade's financial condition, if proven, would establish that a fraud on the court had been committed." CT 2164:17-19; App. C hereto, p. 30. The evidence which is identified in fn. 4 creates a triable issue as to the truth of this allegation and, under the ordinary rules, would therefore preclude summary judgment.

Because of the importance of (1) these questions concerning the conduct of counsel in class actions, and (2) these disturbing issues concerning the integrity of proceedings which are designed to induce the approval, both of a settlement class and of a settlement, plaintiffs seek this writ of certiorari.

FEDERAL JURISDICTION

Jurisdiction over the *McCubbrey* action was predicated upon violations of the Securities Act of 1933, 15 U.S.C. §77 and the Securities Exchange Act of 1934, 15 U.S.C. §78. Jurisdiction over this action is inherent as to fraud on the court (*Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997 (1944)), and ancillary as to other grounds for setting aside the *McCubbrey* settlement (*Freeman* v. *Howe*, 65 U.S. 450, 24 How 450 (1860); *Krippendorf* v. *Hyde*, 110 U.S. 276, 28 L.Ed. 145, 4 S.Ct. 27 (1884); *Pacific Railroad of Missouri* v. *Missouri-Pacific Railway Co.*, 111 U.S. 505, 522, 28 L.Ed. 498, 4 S.Ct. 583 (1884)). Jurisdiction over the attorney defendants is also ancillary. *Valerio* v. *Boise Cascade*, 645 F.2d 699 (9th Cir. 1981); *Krippendorf*, *supra;* 7 *Moore's Federal Practice* 644, ¶60.38[1].

ARGUMENT

I.

DEFENDANT ATTORNEYS' REJECTION OF THE UNDISCLOSED SETTLEMENT OFFER OF $74 MILLION WHICH CONTAINED NO SPECIFIED AMOUNT FOR ATTORNEYS' FEES AND COSTS IN PREFERENCE FOR ONLY $64 MILLION,[13] WHICH AMOUNT SPECIFICALLY INCLUDED $2.5 MILLION IN ATTORNEYS' FEES AND COSTS, WAS A FRAUD ON THE COURT WHICH REQUIRES THE SETTING ASIDE OF THE SETTLEMENT.

Neither defendants nor the courts below question the proposition that it would have been not only improper, but a fraud on the court, for the attorneys for the *McCubbrey* class secretly to agree to a reduction in the benefits payable to the class in exchange for Boise's agreement either to pay a specified amount in attorneys' fees or to refrain from objecting to such payment. Incredibly, however, neither the trial court nor the Ninth Circuit made any references whatsoever in their opinions to this exceedingly important issue, much less to plaintiffs' incontrovertible evidence that this very fraud had, in fact, occurred. In connection with fee requests in class actions, the court stands as the sole guardian of the absentee class members, since the interests of the class attorneys therein necessarily are adverse to those of their clients:

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[13] Plaintiffs quote gross settlement figures here because they were utilized in the offers and acceptances to which plaintiffs refer. Elsewhere in the record net settlement figures are sometimes utilized, thereby reflecting the settlement's potential for return of the property to Boise (which potential did not materialize). The difference between gross and net figures is about $6 million.

> "When a contingent fee contract[11] is to be satisfied from a settlement fund approved by the trial judge pursuant to Fed. R. Civ. P. 23(e) the court has an even greater necessity to review the fee arrangement for this rule imposes upon it a responsibility to protect the interests of the class members from abuse. In such circumstances, the role of the attorneys is drastically altered; they then stand in essentially an adversarial relationship to their clients who face a reduced award to the extent that counsel fees are maximized." *Dunn* v. *H. K. Porter Co., Inc.*, 602 F.2d 1105, 1109 (3d Cir. 1979).

The law prohibits attorneys for a plaintiff class from negotiating their fees with defendants where the payment thereof is to come from a restitution fund which otherwise would be available in its entirety for payment to the class. *Norman* v. *McKee*, 290 F.Supp. 29, 36 (N.D. Cal. 1968) *affd.*, 431 F.2d 769 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1970); *Prandini* v. *National Tea Co.*, 557 F.2d 1015, 1020-1021 (3d Cir. 1977); *Munoz* v. *Arizona State University*, 80 F.R.D. 670, 671-672 (D. Ariz. 1978). As the court in *Jamison* v. *Butcher & Sherrerd*, 68 F.R.D. 479 (E.D. Pa. 1975) put it (page 484):

> "The present arrangement leaves the unfortunate impression that defendants are buying themselves out of a lawsuit by direct compensation to plaintiffs' counsel."

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[11] Although no contingent fee contract was here involved, the principles to which the court in *Dunn* v. *H. K. Porter Co., Inc.*, refers are equally applicable to this case.

Here, the fee agreement was especially pernicious because it provided that if the court did not award the full amount which Boise had agreed to pay, the balance which had been deducted from the restitution fund for that purpose would not inure to the benefit of the class, but rather would revert to Boise's coffers. CT 2794-2795, ¶¶ E-3 through E-4-c; App. F, pp. 17-22. These provisions effectively removed from the court any incentive to examine the fee application with that degree of care which is required in order to protect the class from the attorneys' overreaching. Moreover, although defendants justified the amount of the settlement to the court as having been the "maximum" which Boise could pay, they did not explain why, in the event that the court should disapprove any part of the fee request, the money should be returned to Boise rather than being used to further benefit the class.[14]

II.

THE LAW REQUIRED THE TRIAL COURT TO ALLOW DISCOVERY AND TO PERMIT A USUAL HEARING ON THE MERITS BEFORE DECIDING THE CASE.

No one doubts that the *McCubbrey* settlement must be set aside if it was obtained by fraud on the court. Neither laches nor any statute of limitation is a bar. 7 *Moore's Federal Practice* 509-510, ¶ 60.33. As the court held in *Root Refining Co.* v. *Universal Oil Prod-*

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[14] The disparate manner in which the attorney defendants preferred themselves to their clients is also shown by their negotiation of a settlement wherein the interest which accumulated on the fund which had been set aside for restitution to the class went to Boise, while the interest on the fund for fees to the attorneys went to the attorneys. CT 2796; App. F at ¶¶ E-3; E-4-d.

ucts Co., 169 F.2d 514, 522 (3d Cir. 1948), fraud on the court is a concern of "vast public importance, so that it becomes immaterial that the injured party may have been derelict in bringing the fault to the court's attention."

The trial court here held, *sub silentio*, that the outrageous conduct which is outlined above was insufficient to justify either an evidentiary hearing or *any* discovery. Instead, the trial court purported to dispose of this case on summary judgment under newly minted rules of procedure which, at least until the Ninth Circuit's affirmance, were peculiar to it alone.

Unquestionably, the court had jurisdiction to hear the claim. Facts sufficient to warrant a setting aside of the judgment had been adduced. The court's power having thus been invoked, the usual hearing (i.e., trial) was mandatory.

The trial court, and defendants on appeal, allegedly justified the court's depriving plaintiffs of the means of gathering evidence (by a ban on discovery and a "gag" order) on the ground that this action seeks to set aside a judgment for fraud on the court, relying on *H. K. Porter Co., Inc.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir. 1976). However, that case involved a Rule 60(b) motion in the same action in which the judgment had been obtained. The motion sought additional, post-judgment discovery, and was based upon a claim that documents had been withheld in pre-trial discovery. The court held movant Goodyear's request to be overbroad and, in light of Goodyear's massive pre-trial discovery, it refused further post-judgment discovery. Here, the trial court never permitted any discovery at all, but rather created a previously unrecognized exception to the discovery rules, which exception it apparently deems to be applicable only to actions which attack judgments in prior cases. But in *In re General Motors Corporation Engine Interchange Litigation*, 594 F.2d 1106 (7th Cir. 1979), *cert. denied*, 444 U.S. 870 (1979), where a proposed settlement had been negotiated under circumstances suggestive of impropriety, the trial court's refusal to permit discovery concerning settlement negotiations was reversed by the Seventh Circuit, which spoke as follows (page 1124):

> "We think that the conduct of the negotiations was relevant to the fairness of the settlement and that the trial court's refusal to permit discovery or examination of the negotiations constituted an abuse of discretion. In addition, we do not think that the record adequately supports the court's conclusion that the seemingly irregular conduct of the negotiations did not prejudice the interests of the class. We must, therefore, reverse. . . ."

This court emphatically has rejected the *de facto* rule of this case that the "hearing" of a charge of fraud on the court may proceed differently than do those in other cases. Thus, in *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997 (1944), which, like this, was an independent suit in equity to set aside a judgment for fraud on the court, the majority said (page 249, n. 5):

> "We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross examination of witnesses."

Mr. Justice Roberts, in his dissent, likewise noted (322 U.S. at 252):

> "This is a suit in equity in the District Court to set aside or amend the judgment. Such a proceeding is required by settled federal law and would be tried, as it should be, in open court with living witnesses instead of through the unsatisfactory method of affidavits. We should not resort to a disorderly remedy, by disregarding the law as applied in federal courts ever since they were established, in order to reach one inequity at the risk of perpetrating another."

III.

THE "SETTLEMENT CLASS" SHOULD NOT BE UTILIZED TO AVOID A CERTIFICATION HEARING.

The certification of a "settlement class" in order to avoid litigation of the certification issue has been disapproved by numerous commentators. *See, e.g.*, 1 *Moore's Federal Practice* (Part 2), "Manual for

Complex Litigation" 71-74, ¶ 1.46. A class action under Rule 23(b)(3) is maintainable, as a matter of due process, only when the commonality of the claims insures that the named plaintiffs will adequately represent the class. Inadequate representation denies due process. *Hansberry* v. *Lee* 311 U.S. 32, 85 L.Ed. 22, 61 S.Ct. 115 (1940).

This court never has ruled on the propriety of certifying a class for settlement purposes only. This case provides a vivid illustration of most of the reasons why this court now unequivocally should disapprove that procedure. The reasons are because, as occurred here, with a certification for settlement only:

1. There is no assurance that class members will be represented adequately. Manual for Complex Litigation, *supra*, at 71.[15]
2. Interests among the class members may be conflicting. *Ibid.*[16]
3. In the absence of discovery and thorough preparation for trial, there cannot be an accurate appraisal of the potential liability and damages. *Id.* at 72.[17]

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[15] See, *supra*, argument I at pp. 12-14 and fn. 6 at p. 6.

[16] Defendants here *conceded* that they had represented conflicting interests. See, *supra*, fn. 6 at p. 6.

[17] The *only* analysis of the evidence which was provided to the *McCubbrey* court (and class) was an eight-page memorandum which *Boise* filed on the very morning of the "fairness" hearing. CT 2514 (Doc. No. 77). The class representatives propounded *no* evidence whatsoever in support of the fairness of the settlement, instead contenting themselves with the filing of a lengthy application for attorneys' fees. CT 2491 (Doc. No. 73). At least one court has noted the embarrassing irony of a short memorandum in support of the settlement coupled with a 200-page fee application. *In re Armored Car Antitrust Litigation*, 472 F.Supp. 1357, 1382 (N.D. Ga. 1979).

4. In the absence of commonality, there is an enormous temptation for the attorneys, realizing that they cannot obtain the certification of a class for trial, to take a low settlement in order to protect (and perhaps enhance) their fees, even where the claims are individually viable.

The Manual's recommendation against the use of settlement classes "has, it appears, been more honored by breach than by compliance." *In re Armored Car Antitrust Litigation*, 472 F.Supp. 1357, 1364, fn. 5 (N.D. Ga. 1979). As this case graphically (and painfully) demonstrates, it is time for this court not only to examine but to prohibit the further use of the "settlement class" (at least where the individual claims are substantial).

CONCLUSION

Plaintiffs respectfully submit that the following language of the Seventh Circuit in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), while utilized there in another context, is equally applicable to the situation at bar (pages 569-570):

> "We said in the beginning that the question was delicate and embarrassing and this is so not only because we recognize the ability of the attorney[s] who rendered the services but also . . . because of our respect for the ability and integrity of [the trial judge] . . . Notwithstand-

> ing . . . [this] is shocking to our sense of reason and justice.
>
> * * *
>
> "And we are disturbed because in our sober judgment, this [activity] . . . , if it should become a precedent, is calculated to bring both the bar and the bench into public disrepute."

Defendant attorneys' rejection of an offer which was more favorable to their clients and the class in preference for one which was more beneficial to the attorneys themselves must not be permitted to stand. Furthermore, the lower courts' establishment of new procedural rules which gravely inhibit, rather than facilitate, the prosecution of any equitable action which seeks the setting aside of a prior judgment because of fraud on the court must be repudiated as being contrary to law and inimical to the public interest.

Finally, the use of the "settlement class" must be either carefully limited or totally abolished in order that the denial of due process which occurred to plaintiffs and their class herein may not become a concomitant of Rule 23.

The public must be protected from errant attorneys, who otherwise will become "spoilers," not only of the class action's potential for justice, but of the reputations of the members of the bench and bar who properly so utilize it. For these reasons, the writ should issue.

Dated: October 8, 1981.

ERNEST M. THAYER,
A Professional Corporation
By: ERNEST M. THAYER, ESQ.
Attorneys for Petitioners

Appendix

81-913

Office - Supreme Court, U.S.
FILED
OCT 13 1981
ALEXANDER L. STEVAS,
CLERK

No.

In the Supreme Court of the United States

October Term, 1981

MICHAEL VALERIO, et al.,
Petitioners,
vs.
BOISE CASCADE CORPORATION, et al.,
Respondents.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

A Opinion of the Ninth Circuit Court of Appeals filed May 18, 1981

B Opinion of the Trial Court filed April 6, 1978

C Opinion of the Trial Court filed August 21, 1978

D Order of the Ninth Circuit Court of Appeals Denying Rehearing filed July 15, 1981

E Settlement Offer, *McCubbrey* v. *Boise Cascade*, dated October 20, 1972

F Settlement Agreement, *McCubbrey* v. *Boise Cascade* (without exhibits thereto), dated February 1, 1973

G Letter from John Murray, Esq.

H Letter from Richard Salle, Esq.

I Affidavit of Irving Sulmeyer

J Boise Cascade Corporation Annual Report, 1972 (partial)

APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

MICHAEL VALERIO and YUNG HAO CHANG, Plaintiffs-Appellants,

v.

BOISE CASCADE CORPORATION, et al., Defendants-Appellees.

Nos. 79-4264, 79-4241.

Appeal from the United States District Court for the Northern District of California

Before DUNIWAY and FERGUSON, Circuit Judges, and GRANT,* District Judge.

Argued and Submitted Dec. 9, 1980.

Decided May 18, 1981.

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*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

PER CURIAM:

In May, 1973, the district court approved a class action settlement in McCubbrey v. Boise Cascade Home & Land Corporation, N.D. Cal., 71 F.R.D. 62. That litigation, arising out of the sale of recreational real properties by Boise Cascade, involved a class of 44,000 plaintiffs as well as the California Attorney General and several county district attorneys. Although Valerio and Chang elected to participate in the settlement finally hammered out in that complex litigation, they now seek to overturn it and reopen the settled claims, and further seek recovery from the class attorneys including the Attorney General. They argue, inter alia, that the notice of proposed settlement and the representation provided by counsel to the class were constitutionally inadequate and that the court's approval of the settlement was obtained by fraud on the court. They argue further that the class attorneys are liable for fraud and malpractice. The district court granted defendants' summary judgment motions and we affirm.

1. JURISDICTION

The district court had jurisdiction over the state law claims against the class attorneys. The court had jurisdiction over plaintiffs' claims of fraud on the court in the earlier settlement. See Martina Theatre Corporation v. Schine Chain Theatres, Inc., 2 Cir., 1960, 278 F.2d 798, 800 n.1; Moore's Federal Practice, vol.7, ¶ 60.38, pp. 642-44. As part of this action, the court could properly exert jurisdiction over the class attorneys whose fees were awarded as part of the settlement. See Moore's supra, at p.644 ("[A]ncillary jurisdiction is sufficiently broad so that the action may be maintained against a person who was not a party to the original proceeding"): Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 1884, 111 U.S. 505, 522, 4 S.Ct. 583, 592, 28 L.Ed. 498; Cf. Universal Oil Products Co. v. Root Refining Co., 1946, 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447. ("The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation.") Jurisdiction over plaintiffs' state claims of fraud and malpractice against the class attorneys, deriving "from a common nucleus of operative fact" with the federal claims, may then be supported by the doctrine of pendent jurisdiction. United Mine Workers of America v. Gibbs, 1966, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed. 2d 218.

II. THE MERITS

We have closely examined the many arguments made by appellants in their briefs and find them to be fully answered in Judge Peckham's lengthy and careful opinion. Valerio v. Boise Cascade Corporation, N.D. Cal., 1978, 80 F.R.D. 626. We now adopt that opinion. On the facts of this case the district court properly decided these matters on summary judgment.

"Appellants had the right and opportunity to opt out in this action. They chose not to. We believe that they should not now be allowed to play the role of spoilers for a class of more than

[44,000] people when they could have chosen not to be bound by the settlement." Marshall v. Holiday Magic, Inc., 9 Cir., 1977, 550 F.2d 1173, 1177.

Affirmed.

APPENDIX B

Filed Apr 6 5:08 PM '78
William L. Whittaker
Clerk, U.S. District Court
No. Dist. of CA.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL VALERIO, et al.,
Plaintiffs,
v.
BOISE CASCADE CORPORATION, et al.,
Defendants.

No. C-77-0937 RFP

OPINION

On May 21, 1973, this court entered a final order certifying, for purposes of settlement only, the plaintiff class and approving the settlement in McCubbrey v. Boise Cascade Home & Land Corporation, No. C-72-0470 RFP. The instant class action was filed on May 6, 1977, by Michael Valerio and Yung Hao Chang, who were members of the McCubbrey class and participants in that settlement. Now, however, they seek an order vacating the McCubbrey judgment, "substituting the attorneys for plaintiffs herein for those who are now of record for plaintiffs in that action and placing the matter on the court's trial calendar." Plaintiff's First Amended Complaint at 63. Their amended complaint also seeks $800,000,000 in damages and $1,000,000,000 in punitive damages as well as equitable relief for alleged violations of the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and pendent claims. Included in the pendent claims are claims against many of the private attorneys who represented the McCubbrey class and against the Attorney General of California for fraud and negligence allegedly arising out of breaches of contractual and fiduciary duties which breaches, it is claimed, were committed in the course of achieving the McCubbrey settlement.

On March 31, 1978, this court granted the summary judgment motions of the Attorney General and of the private attorney defendants (hereinafter these defendants collectively shall be referred to as the "attorney defendants" or simply the "defendants"). The court also denied the plaintiffs' cross motion for partial summary judgment. This opinion is in support of that order.

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The causes of action relevant to this discussion are stated in counts XV, XVII, XVIII, XXIV, and XXV of the Plaintiffs' First Amended Complaint. The first three counts allege fraud and deceit by the attorney defendants in breach of their fiduciary duty to the McCubbrey class in that in the Notice of the proposed settlement they fraudulently misrepresented and concealed material facts and thereby induced the plaintiffs to enter into a settlement agreement that they otherwise would not have accepted.[1/] Among other things, the defendants allegedly concealed "the fact that no minimum recovery per class member had been established," amended complaint ¶ 132(d); they concealed the "alleged liability" of plaintiffs for lot assessments, id. ¶ 132(f); and they implied that "each plaintiff would receive a

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[1/] The plaintiffs also argue in their memoranda that for these same reasons the Notice of the proposed McCubbrey settlement violated due process and hence the McCubbrey judgment is not binding upon them. This opinion does not address that contention.

substantial portion of his compensatory damages through the settlement." Id. ¶ 132(c). Counts XXIV and XXV allege that, by virtue of the fraud and deceit that are the basis of counts XV, XVII and XVIII, the defendants breached various written and oral contracts of employment with the McCubbrey class, count XXIV, as well as the covenant of good faith and fair dealing implied in said contracts, count XXV. These two counts are in essence claims for professional malpractice or negligence.

The defendants argue that many of the plaintiffs' claims are insufficient to state a claim for relief against the attorney defendants. We need not decide that question, however, as the court is convinced that any claims for relief based upon the allegations set forth in counts XV, XVII, XVIII, XXIV, and XXV are barred by the relevant statutes of limitation.

The statute of limitations defense raises two questions: the first is which statutes apply to this situation; the second question is when did the limitations periods begin to run.

A. The Relevant Statutes of Limitation

The parties agree, and this court concurs, that the fraudulent representation and concealment claims of counts XV, XVII and XVIII are governed by section 338(4) of the California Code of Civil Procedure, which states that the limitations period is three years for "an action for relief on the ground of fraud or mistake." Cal. Code Civ. P.§ 338(4) (West Supp.1978). The parties, however, differ as to the applicable statute of limitations for counts XXIV and XXV. The defendants contend that the two-year limitations period for "an action upon a contract, obligation or liability not founded upon an instrument in writing," id. § 339(1), applies to those claims. The plaintiffs argue that the four-year statute of limitations applicable to "an action upon any contract, obligation or liability founded upon an instrument in writing," id. § 377(1), should govern the claims stated in counts XXIV and XXV. The "instrument in writing" upon which plaintiffs base their argument is this court's order certifying the McCubbrey class.

We agree with the defendants that the applicable statute of limitations is section 339(1). The California courts consistently have held that a legal malpractice claim, whether brought as a tort action for negligent injury or as a contract action for a breach of an implied duty of care, is governed by the two-year limitations period. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 182, 98 Cal. Rptr. 837, 491 P.2d 421 (1971). See also, Bedolla v. Logan & Frazer, 52 Cal. App. 3d 118, 125, 125 Cal. Rptr. 59 (1975). The courts have been equally consistent in their position that to bring the four-year limitations period into play "it is not sufficient that the cause of action is in some way remotely or indirectly connected with such an instrument or that the instrument is a link in the chain establishing the cause of action, but the instrument must, itself, contain a contract to do the things for the nonperformance of which the action is brought." Bernard v. Walkup, 272 Cal. App. 2d 595, 601, 77 Cal. Rptr. 544 (1969); McCarthy v. Mt. Tecarte Land and Water Co., 111 Cal. 328, 340, 43 P. 956 (1896). Neither our order certifying the McCubbrey class nor any other document presented to this court constitutes a written embodiment of the obligations that plaintiffs allege were breached. Accordingly, we hold that the two-year period of limitations, section 339(1), applies to counts XXIV and XXV.

B. The Running of the Limitations Periods

Neither of the statutes of limitations applicable to this case begins to run until the plaintiff knows or should have known of the wrongful acts. More specifically, a cause of action for fraud accrues when the plaintiff discovers the wrongful acts or "has notice or information of circumstances to put a reasonable person on inquiry, or has the opportunity to obtain knowledge from sources open to his investigation." Weir v. Snow, 210 Cal. App. 2d 283, 292, 26 Cal. Rptr. 868 (1962). See Bedolla v. Logan & Frazer, supra, 52 Cal. App. 3d at 125. Similarly, a legal malpractice action does not accrue until the plaintiff knows or should know the material facts essential to show the elements of that cause of action. Neel v. Magana, supra, 6 Cal. 3d at 190. The fact of injury alone has been found sufficient to commence the running of the statute of limitations for a legal malpractice action. Budd v. Nixen, 6 Cal. 3d 195, 201, 98 Cal. Rptr. 849, 491 P.2d 433 (1971) ("the infliction of the damage will alert the client to the attorney's negligence and thus the statute of limitations will then begin to run on any malpractice action"). And the limitations period will begin to run even though the plaintiff may not have discovered every detail of the fraud, Turner v. Lundquist, 377 F.2d 44 (9th Cir. 1967), or all of his harm or injury. Budd v. Nixen, supra, 6 Cal. 3d at 201.

In the instant case the court need not struggle with the question of when plaintiffs "should have known."[2/] Not

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[2/] A good argument can be made, however, that the statute of limitations began to run as of the date of this court's final order of May 21, 1973, if not sooner. As of that date essentially all of the information relevant to the alleged frauds, concealments, omissions, etc., was available to the plaintiffs. For example, plaintiffs claim that the

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only have the plaintiffs failed to meet their burden of proving facts that would excuse their failure to discover seasonably the basis for their present actions,[3/] but

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defendants concealed the absence from the settlement of a requirement that the defendants in the original McCubbrey action register the securities described elsewhere in the instant complaint. Amended complaint ¶ 132(h). Both plaintiffs were aware that the settlement agreement was on file with the court and was available for inspection. Valerio deposition at 28; Chang deposition at 14. Examination of the settlement agreement would have revealed that it contained no such requirement.

[3/] California courts impose a heavy burden upon plaintiffs who, as in this case, bring their action after the apparent expiration of the statute of limitations. The plaintiffs must

> plead and prove the facts showing: (a) Lack of knowledge. (b) Lack of means of obtaining knowledge (in the exercise of reasonable diligence the facts could not have been

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they in fact had actual knowledge of at least one of the major frauds/breach more than three years before they filed this

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> discovered at an earlier date). (c) How and when he did actually discover the fraud or mistake. Under this rule constructive or presumed notice of [sic] knowledge are equivalent to knowledge.

Casualty Ins. Co. v. Rees Inv. Co, 14 Cal. App. 3d 716, 720, 92 Cal. Rptr. 857 (1971) (emphasis in original); Weir, supra, 210, Cal. App. at 292. Federal courts require a similar showing in response to a motion for summary judgment although these matters need not be alleged in the complaint. Turner, supra, at 48. In the present case, plaintiffs have asserted that they did not discover the alleged fraud and negligence until consulting their present attorneys in March of 1977. Valerio deposition at 44; Chang deposition at 24. But "[i]t is not sufficient merely to allege ignorance at one time and discovery at another." Wilson v. Wilson, 199 Cal. App. 2d 542, 545, 18 Cal. Rptr. 768 (1962). Careful scrutiny by this court of all the affidavits, declarations, and depositions placed into evidence by

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lawsuit. Both plaintiffs received their settlement checks, which amounted to approximately 17% of their investment, in the fall of 1973. Deposition of Michael Valerio, July 5, 1977, at 6; Deposition of Yung Hao Chang, July 1, 1977, at 7-8. At that time, the alleged concealment and misrepresentation of facts concerning the amount of recovery per class member was revealed to the plaintiffs and the statute of limitations began to run on all of the

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plaintiffs has failed to reveal any specific facts indicating why plaintiffs' investigation could not have been initiated at an earlier date nor any specific facts explaining why the alleged fraud and negligence could not have been and should not have been discovered at an earlier date. Consequently, as an alternative basis for our decision, we find that the plaintiffs have not met their burden to excuse their failure to discover their causes of action within the relevant periods of limitation.

plaintiffs' causes of action against the attorney-defendants.[4] Since the instant complaint was filed more than three years

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[4] Plaintiff Valerio's claim that he had no knowledge of the alleged frauds until he contacted his attorneys in March of 1977, also is refuted with respect to the allegation in the complaint that the defendants concealed the "alleged liability" of the plaintiffs for lot assessments. Exhibit N to his affidavit, filed in support of his motion for a preliminary injunction, is a copy of a notice of a special meeting of the members of the Hidden Valley Lake Association to be held on March 23, 1974. According to the notice, the purpose of the meeting was to approve an increase in the annual per lot assessment from $70 to $100. Mr. Valerio attended that meeting and participated in the discussion of the lot assessments. Valerio deposition at 16-17. Mr. Valerio also stated that he received an assessment around November of 1973. Id. at 13.

Plaintiff Valerio did contact the Attorney General to discuss the validity of the continued assessments, but there is no reason to hold that this tolled the running of the statute of limitations as to the Attorney General. In any event, it is our opinion that the Attorney

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later, summary judgment is granted in favor of the attorney-defendants.

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General did not incur any fiduciary duties to the McCubbrey class by virtue of its participation in that settlement. Plaintiffs note that the Attorney General's complaint in intervention in McCubbrey sought relief on behalf of the individual lot purchasers. The California Supreme Court, however, recently held that a claim for restitution does not convert an action by the state into a class action and that therefore defendants in state actions are not entitled to the procedural safeguards, including notice to the class, that are required in a class action by a private party. People v. Pacific Land Research Co., 20 Cal. 3d 10, 141 Cal. Rptr. 20, 569 P.2d 125 (1977). Of particular relevance here is the court's recognition that the Attorney General's "role as a protector of the public may be inconsistent with the welfare of the class," for example, in settlement negotiations. Id. at 18 & n.6. Thus not only are any claims against the Attorney General barred by the statutes of limitations, but we also believe that the plaintiffs' allegations fail to state a claim for relief against the Attorney General and make this an alternative basis for our decision in its favor.

II. THE PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

The subject matter of these motions simply is inappropriate for summary judgment. The plaintiffs do not seek summary judgment on any of their claims but rather on isolated factual and legal issues. For example, they seek summary judgment on the issue of whether "Boise Cascade Corporation could, in fact, have paid a sum in settlement of the McCubbrey action many times larger than the amount which it did pay," and on the issue of whether "Boise Cascade Corporation, the parent, would have been held liable in McCubbrey for the illegal acts and omissions of its subsidiaries." Assuming arguendo the court's ability to resolve such questions, a summary judgment motion is not the proper method of raising them. "[W]hile Rule 56 'contemplates a summary judgment for a part or all of the claim made in the prayer of the claimant,' it 'does not contemplate summary judgments on evidentiary matters en route to that goal.'... 'Rule 56(d) does not authorize the initiation of motions the sole object of which is to adjudicate issues of fact which are not dispositive of any claim or part thereof.'" 6 Moore's Federal Practice ¶ 56.20[3.-2] (2d ed.1948). Plaintiffs' motions for partial summary judgment therefore are denied.

SO ORDERED.

Dated: April 6, 1978

/s/ ROBERT F. PECKHAM
United States District Judge

APPENDIX C

FILED-
AUG 21 1978

William L. Whittaker
Clerk, U.S. District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL VALERIO and YUNG HAO CHANG, etc., et al., Plaintiffs,	No. C-77-0937 RFP
v.	
BOISE CASCADE CORPORATION, et al., Defendants.	O R D E R

We recited the background of this action in our opinion of April 6, 1978, thusly: "On May 21, 1973, this court entered a final order certifying, for purposes of settlement, only, the plaintiff class and approving the settlement in McCubbrey v. Boise Cascade Home & Land Corporation, No. C-72-0470 RFP. The instant class action was filed on May 6, 1977, by Michael Valerio and Yung Hao Chang, who were members of the

McCubbrey class and participants in that settlement. Now, however, they seek an order vacating the McCubbrey judgment, 'substituting the attorneys for plaintiffs herein for those who are now of record for plaintiffs in that action and placing the matter on the court's trial calendar.' Plaintiffs' First Amended Complaint at 63. Their amended complaint also seeks $800,000,000 in damages and $1,000,000,000 in punitive damages as well as equitable relief for alleged violations of the Sherman Act, the Clayton Act, the Robinson-Patman Act, the Securities Act of 1933, the Securities Exchange Act of 1934, and pendent claims. Included in the pendent claims are claims against many of the private attorneys who represented the McCubbrey class and against the Attorney General of

California for fraud and negligence allegedly arising out of breaches of contractual and fiduciary duties which breaches, it is claimed, were committed in the course of achieving the McCubbrey settlement."

In our April 6 opinion, we held that the plaintiffs' causes of action against the attorney defendant were barred by the relevant statutes of limitation. This instant memorandum and order concerns itself with the motions to dismiss and/or for summary judgment of the remaining defendants.

I

Beginning in 1971, a series of public and private lawsuits were filed asserting, inter alia, claims of fraud, breach of contract and violations of federal and state securities laws, all arising out of the sale of property in Boise Cascade recreational subdivisions. These actions were consolidated and terminated on May 21, 1973, when this court entered its final order and judgment. The history of the negotiations that culminated in the settlement is relevant to the motions currently before this court. Briefly, it is as follows:[1]

In early 1972, settlement negotiations in the public action, People v. Boise Cascade Recreation Communities Corporation of Delaware, et al., Civ. No. 127902, occurred between the defendants and representatives of the Attorney General's office and the offices of the District Attorneys of Contra Costa, Nevada and Sacramento Counties. Boise's offer to establish a $10,000,000 settlement fund which figure included both cash refunds and cancellations of indebtedness, was rejected by the Attorney General and subsequently by the private attorneys as well. Negotiations continued, however, and intensified in late 1972, partially as a result of Boise Cascade's disclosure to the public attorneys of financial difficulties it was then experiencing.

These financial difficulties in part stemmed from Boise's decision to withdraw from the recreation land business and as a consequence thereof to take a write-off against income in the pretax amount of $210 million. A related and more pressing problem facing Boise, was the fact that as of 1972, it was in default on outstanding loans totaling hundreds of millions of dollars and was operating under waivers from its major institutional lenders. As a condition of restructuring Boise's debt these lenders were insisting that the financial problems, including the pending lawsuits of Boise Cascade Home and Land Corporation, be resolved satisfactorily.[2] The fear that these lenders might carry out their threat to accelerate the debts owed them in order to assure payment before any judgments might be obtained against Boise, was a major factor in the decision of the public attorneys to agree to a tentative settlement, that provided, inter alia, for a settlement fund of $24,000,000. Boise then presented the same settlement to the attorneys in the six private actions, and the latter consolidated their efforts for purposes of discussing settlement. Similarly, the Attorney General and the other public attorneys presented the outlines of the settlement to all of the district attorneys of California and obtained their approval to proceed. From that point onward, both the public and private attorneys labored to work out the final agreement as well as substantiate Boise's claim of financial distress.

By mid-February of 1973, a final agreement acceptable to all parties was reached. Pursuant to negotiations, motions then were made seeking consolidation of the private actions, allowing the filing of an amended complaint and permitting the intervention of the California Attorney General. On March 9, 1973, these motions were granted and this court conditionally approved the proposed settlement. At the same hearing, this court made a finding that the proposed notice was adequate and directed its mailing. On March 23, 1973, more than 41,000 notices were mailed to the members of the McCubbrey class, which ultimately totaled 44,000 people.

The fairness hearing was held on May 15, 1973, the date stated in the notice. At the hearing the factors underlying the settlement, including Boise's financial situation, were reiterated, as were the basic terms of the settlement. The court then invited and received questions from class members and attorneys regarding the effect of the settlement. In most instances the court asked counsel to comment on or explain how the settlement affected the concerns expressed. At the conclusion of the hearing, the court noted its satisfaction with the settlement, and on May 21, 1973, this court entered a final order and judgment certifying the McCubbrey class for the purposes of settlement only, and approving the settlement agreement, including the provision for attorneys' fees.

II

The defendants argue, inter alia, that the plaintiffs claims are barred by the McCubbrey judgment and the releases obtained from the class. Before considering the merit of that defense, we first must deal with the plaintiffs' contentions that the notice of the proposed settlement and representation provided by counsel were constitutionally defective and that this court's approval of the settlement was obtained by fraud committed by the McCubbrey defendants and by the private and public attorneys who represented the plaintiffs and the State of California. If there is a basis for any of these contentions, then the defendants are not entitled to summary judgment on the basis of res judicata.

A. The Adequacy of the Notice

Due process requires that notice in a class action "present a fair recital of the subject matter and proposed terms and given [sic] an opportunity to be heard to all class members." Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1177 (9th Cir.1977). When this court approved the notice in 1973, we were satisfied that it met the requirements of due process and we so held. It described the pending litigation and the claims asserted therein, it explained the general terms of the proposed settlement, and it set forth the options available under it. In addition, it gave the address and phone number of the settlement committee and emphasized the committee's availability to answer any questions or give advice about any of the matters in the notice. It also noted that all of the documents concerning this action, including the amended complaint and the settlement agreement, were available for inspection at the courthouse and it further informed class members that they should feel free to consult with an attorney of their own choosing. Finally, part II of the notice set forth the date, time and location of this court's hearing to determine the fairness of the settlement, the appropriateness of a class action and the amount of attorneys' fees to be paid to the class attorneys. In In re Four Seasons Securities Laws Litigation, 525 F.2d 500, 503 (10th Cir. 1975), the Tenth Circuit found a similar notice to be "far more than adequate."

The plaintiffs' contention that the McCubbrey notice was not adequate is based primarily on the fact that it did not state that Boise Cascade's financial predicament was a factor in the settlement. Although the defendant's financial condition is a factor for the court to weigh in considering the acceptability of a class action settlement, Marshall, supra, at 1178, plaintiffs have cited no cases, and we have found none, wherein failure to include such information in the notice rendered it constitutionally defective. This is not to say that it would have been impermissible to include such information in the notice,[3] see id., but only that due process does not require its inclusion.

Plaintiffs further claim that the notice violated due process because it did not specify the minimum recovery possible under the settlement. The notice, however, did state that "[t]he fund [$30,000,000][4/] will be distributed in one of three ways, depending on the number and amount of allowed claims." It then detailed the three possible methods of distribution: (1) full restitution, including refund of all cash payments made by claimant, with return of property to Boise Home and Land; (2) partial restitution, including refund of at least 60% of all cash payments made by claimant before filing his claim and all cash payments made by claimant after filing his claim; (3) partial restitution, including a cash refund of a percentage of all payments made with no return of property to Boise Home and Land. A similar argument that due process requires more than this was rejected in Marshall, supra. There the court, per Judge Carter, stated,

> They argue that the notice did not fairly apprise class members of their positions because it did not specify their potential recovery. It is obvious, however, that this was a matter of conjecture since it was unknown how many class members would opt out or submit claims. The aggregate amount available to all claimants was specified and the formula for determining one's recovery was given. Nothing more specific is needed. See Cannon v. Texas Gulf Sulfur, 55 F.R.D. 308, 313 n.2 (S.D.N.Y.1972) (approval of the TGS settlement).

Id. at 1177-78.

The balance of plaintiffs' objections to the adequacy of the notice are refuted by the record and/or are so trivial that they could never be the basis for setting aside the McCubbrey judgment.[5/] We thus find that McCubbrey notice was adequate.

In this posture, the instant case is strikingly similar to In re Four Seasons, supra. There the appellant argued that the notice was inadequate because it failed to inform him of criminal investigations that had been made of some of the corporate officer defendants. As noted above, the Tenth Circuit found the notice adequate despite this omission. The court further stated,

> The appellant was well aware through the notice that he could make further investigation of the basis for and background of the settlement. The court files were expressly suggested to him, the hearing date was stated, and the possibility of questions to his counsel was indicated. Appellant however made no effort to utilize the suggested sources, and cannot now be heard to complain that he did not know what they would have revealed. No one withheld information from appellant. Instead his lack of knowledge came about from his own failure

> to inform himself as to a matter he now complains was unknown to him. Thus, if the notice met the due process requirements, and we hold that it did; and if it met the standards in the rule, and again it did; as to anything beyond that by way of facts the appellant had the duty to ascertain on his own in deciding to opt in or out, or for any other reason.

525 F.2d at 503 (emphasis added).

Similarly, plaintiffs' ignorance of Boise's claims of financial distress is attributable to their own failure to investigate, not to the inadequacy of the notice. It would be an understatement to say that the plaintiffs' scrutiny of the McCubbrey settlement proceedings was far less in 1973, than it is now that they are seeking a determination that the judgment is void as to all 44,000 members of that class. Both of the plaintiffs received and read the notice of the proposed settlement. Plaintiff Chang, however, made no inquiries of the settlement committee nor did he consult an attorney regarding any of the matters contained in the notice. Plaintiff Valerio likewise did not consult an attorney, although he did call the settlement committee to ask how to fill out the claim form. He also asked how much money he would receive by participating in the settlement and was told that it depended upon how many claims came in.[6/] Neither of the plaintiffs availed themselves of the opportunity to examine the documents on file with the court, nor did they appear at the fairness hearing although both resided in the Bay Area.[7/] In sum, plaintiffs did little more after receiving the notice than to file their claims for restitution and to cash the claim checks that they subsequently received in the fall of 1973.[8/]

B. The Adequacy of Representation

Plaintiffs contend that many of the same acts and omissions that rendered the notice constitutionally defective also demonstrate the inadequacy of the representation given the class. In light of our determination that the notice satisfied due process it follows that, under the circumstances of this case, there was adequate representation.

Our conclusion is further warranted by the fact that the McCubbrey class received notice of the suit, of the proposed settlement and its terms, and of the opportunity to opt out, all at the same time. In similar circumstances, the Tenth Circuit has held that "due process may be satisfied by notice alone and that, where due process is thus satisfied, adequacy of representation need not be shown as a matter of constitutional necessity." In re Four Seasons Securities Laws Litigation, 502 F.2d 834, 843 (10th Cir.), cert. denied, 419 U.S. 1034 (1974). While this holding has been criticized as a general proposition, see Comment, The Importance of Being Adequate: Due Process Requirements in Class Actions Under Federal Rule 23, 123 U. Pa. L. Rev. 1217, 1219 (1975), even that critic agreed that the Tenth Circuit's holding was proper under the circumstances of that case. Id. at 1219 & 1223. And, in Marshall, supra, the Ninth Circuit took a position quite similar to that of the Tenth Circuit. In Marshall, the appellants argued that "adequate representation by a single lead counsel was impossible becaue of ... intra-class conflicts." 550 F.2d at 1177. The court found that the conflict was not of the type that would render maintenance of the class action an abuse of discretion and it additionally noted that because the class action was brought under rule 23(b)(3),

> [a]ppellants had the right and opportunity to opt out in this action. They chose not to. We believe that they should not now be allowed to play the role of spoilers for a class of more than 31,000 people when they could have chosen not to be bound by the settlement. See generally, Developments in the Law--Class Actions, 89 Harv. L.Rev. 1318, 1485-89 (1976) (hereinafter cited as Developments).
>
> This conclusion is reinforced in this case by the fact that all class members were given the right to opt out after being apprised of the terms of the settlement. Appellants were not forced into a position of having to predict whether their interests would be

> adequately represented. They could determine whether there had been adequate representation of their interests by reviewing the terms of the settlement. If they were dissatisfied, they could opt out of the class. This opportunity to opt out after knowing the terms of a proposed settlement is unusual in the class action context and serves to protect the interests of class members. See Ace Heating & Plumbing Co. v. Crane Co., 453 F.2d 30, 33 (3 Cir. 1971). Appellants' rights were fully protected by this right to opt out. We therefore hold that they were adequately represented.

Id. (emphasis in original).

The plaintiffs' reliance on Mandujano v. Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir.1976), is misplaced. Mandujano's discussion of the attorney-client relationship in class actions was in the context of that court's development of "Procedures To Protect Dissidents In Title VII Class Actions." Id. at 834 (emphasis in original). Even in that context, i.e., rule 23(b)(2) class actions where the opportunity to opt out does not exist, we doubt that Mandujano stands for the proposition urged by plaintiffs: that the attorney-client relationship in a class action is identical to that in a nonclass action.

Such a contention is even more dubious when applied to rule 23(b)(3) class actions like McCubbrey. First, as noted by Judge Kennedy in his concurring opinion in Marshall,

> It is not clear that Mandujano, which sets forth precise procedures for district courts to follow in class actions brought under Fed.R.Civ.P. 23(b)(2), is applicable to a class action like the one here, brought under rule 23(b)(3).

550 F. 2d at 1179. Second, while, despite Judge Kennedy's caution, the

Marshall majority did rely on Mandujano in reaching its conclusion that the trial court did not abuse its discretion in approving the settlement presented, it is significant that the court did not even mention Mandujano in its analysis of the adequacy of representation. Instead, as alternative bases for its conclusion that the representation was adequate, the court emphasized the facts that the objectors had the opportunity to opt out of the class and that they were in the unique position of being able to exercise this option after having been apprised of the terms of the settlement. These same considerations, along with those noted above, warrant our conclusion that the representation provided the McCubbrey class was in fact adequate.[9/]

C. Fraud on the Court

In their continuing efforts to avoid the res judicata effect of the McCubbrey judgment, the plaintiffs have made the very serious charge that the McCubbrey defendants, the plaintiffs' attorneys therein and the Attorney General committed a fraud on this court.[10/]

1. The Attorney Defendants

The charge against the attorneys is extremely troublesome: not because it has any merit, but because it so obviously does not. It is difficult enough to believe that more than 20 respected members of the bar representing clients in six separate actions would conspire to defraud their clients and this court. The fact that the Attorney General and several district attorneys actively participated in the McCubbrey negotiations and settlement on behalf of all the district attorneys of California and the people of this state only serves to heighten our incredulity. Analysis of the allegations made against the attorneys confirms our belief that this charge of fraud on the court was unjustifiably and recklessly made.

The plaintiffs contend that the attorney defendants committed a fraud on the court in that, inter alia, they

> (1) did not advise the court of their assessment of the merits of the case or of the actual damages sustained; (2) did not advise the court that the notice to the class contained no mention of the fact that the sum which was being proposed for settlement had not been arrived at upon the basis of any evaluation of the merits of the case or the damages sustained, but rather upon the claim of Boise that if that sum were not accepted, it would go bankrupt; (3) did not advise the court that in accepting this basis for the settlement, they had

> relied upon Boise's own presentation of its financial condition; (4) did not advise the court that they had pledged to Boise to keep secret from their own clients the facts concerning this basis for the settlement; (5) did not advise the court that there were unexplored avenues through which to obtain more compensation for the class on a basis which would be contingent upon Boise's return to financial health; (6) did not advise the court that documents which were pertinent to the settlement had been filed as late as 8:36 a.m. on the morning of the fairness hearing; (7) did not advise the court that they had agreed with Boise upon their attorneys' fees prior to the fairness hearing, but had not advised the class of that agreement or of Boise's pledge to support their fee application; (8) represented to the court as being costs what was, in fact, an additional attorney's fee.11/

Assuming arguendo the truth of these and similar allegations, none of them prove fraud on the court.

While the precise parameters of

"fraud on the court" remain undefined, that phrase is "to be read narrowly, in the interest of preserving the finality of judgments, which is an important legal and social interest." Toscano v. Commissioner of Internal Revenue, 441 F. 2d 930, 934 (9th Cir. 1971). Based largely upon the leading case of Hazel-Atlas Co. v. Hartford-Empire Co., 322 U.S. 238 (1944), Professor Moore has suggested the following definition, which also is that suggested by the plaintiffs here:

> "Fraud upon the court" should . . . embrace only the species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can not perform in the usual manner its impartial task of adjudging cases that are presented for adjudication.

7 Moore's Federal Practice ¶ 60.33 at

512-13 (2d ed. 1970). In summarizing the types of conduct that do or do not constitute fraud on the court, the court in United States v. International Telephone & Telegraph, 349 F.Supp. 22 (D. Conn. 1972), aff'd sub nom Nader v. United States, 410 U.S. 919 (1973), stated,

> Generally speaking, only the most egregious misconduct, such as bribery of a judge or members of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute a fraud on the court. See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); Root Refin. Co. v. Universal Oil Products, supra, 169 F.2d 514; 7 J. W.Moore, Federal Practice, para. 60.33 at 510-11. Less egregious misconduct such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court. See Kupferman v. Consolidated Research & Mfg. Co., supra, 459 F.2d 1072; see also England

> v. Doyle, 281 F.2d 304, 310 (9th Cir. 1960).

Id. at 29 (emphasis added). See also Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978) (quoting IT&T).

We seriously doubt that even the most liberal definition of fraud on the court would encompass the acts complained of and when that phrase is given the narrow interpretation that our interest in finality of judgments requires, it is clear that even assuming the truth of all of these allegations, they do not establish fraud on the court.

Plaintiffs also claim that the failure of the notice to discuss the financial condition of the Boise defendants establishes not only its constitutional inadequacy and fraud on the class, but also fraud on the court. Unless it is plaintiffs' position that this court somehow committed fraud by not insisting on the inclusion of that information in the notice, we do not understand how this omission established fraud on the court since we were fully apprised of Boise's claims of financial distress. In any event, because we have found that the notice satisfied the dictates of due process, we reject all charges stemming from the alleged inadequacy of the notice as a basis for a finding of fraud on this court.

In contrast, the allegation that the class attorneys misrepresented Boise Cascade's financial condition, if proven, would establish that a fraud on the court had been committed. As noted earlier in this memorandum, the financial condition of the defendant is one of the factors to be considered in assessing the adequacy of a proposed class action settlement. Thus, deliberate misrepresentations of Boise Cascade's financial condition would constitute an "unconscionable plan or scheme which is designed to improperly influence the court in its decision." England v. Doyle, 281 F.2d 304, 309 (9th Cir. 1960). Our review of the allegations concerning the conduct of the class attorneys, however, reveals that the charge against them is not really that they committed fraud upon the court but rather that they exercised poor judgment in recommending approval of the settlement.

The plaintiffs state, for example,

> Furthermore, although the attorneys represented to this court that the ultimate justification for the proposed settlement was Boise's inability to pay more, the attorneys could not

reasonably have believed this to be true, and so a further fraud was committed on the court. This appears, among other places, in the transcript of the fairness hearing itself. Thus, at pages 10-12 thereof, Jay Linderman, Deputy Attorney General, stated, in substance, that (1) in assessing the financial condition of Boise, the attorneys for the class had relied upon the representations of Boise officials; and (2) the final figure for restitution was raised from $10,000,000 to $24,000,000 during a meeting in London of a few hours duration in which only two attorneys and no accountants participated. This is shocking. It is absurd to settle a case for a figure in the tens of millions of dollars upon the basis, not that it is fair but, that it is all that the defendants can pay when the justification therefor is the unsworn statements of the defendants who, to make matters worse, are in the position of having to pay any money at all only because of a deliberate program of falsehood.

Even assuming that the defendants might not have been able to pay more cash right there and then, it is apparent to all, even without the benefit of

> sophisticated accountants, that there are a number of devices by which the class could have been placed in a position to obtain additional compensation if Boise prospered, which it did. These devices include: (1) notes; (2) notes payable only when earnings reach a certain level; (3) subordinated notes; (4) subordinated debentures; (5) preferred stock; and (6) equity stock.12/

Assuming the validity of plaintiffs' contention that more advantageous alternatives to the settlement proposal should have been "apparent to all," then it follows that this court is as guilty of exercising poor judgment as are the attorney defendants. Most assuredly, however, this court is not thereby guilty of fraud and neither are they.

2. Boise Cascade13/

The plaintiffs make a variety of allegations that they contend establish fraud on the court.[14/] But, as in the case of the attorney defendants, only the charge that Boise affirmatively misrepresented its financial condition could support a finding of fraud on the court; and again as with the attorney defendants, there is simply no basis for such a charge.

The basic elements of Boise's "financial predicament" were outlined in part I of this order. In 1973, no one could be sure what the consequences of failing to settle McCubbrey would have been. The possibility existed, however, that Boise's lenders would have accelerated the debts owed to them and that Boise might have been forced into bankruptcy or reorganization, if not immediately then at some point in the future if the pending actions were prosecuted successfully. Plaintiffs may dispute the wisdom of the inferences and the decisions that were based upon the information provided by Boise, but they have given us no reason to believe that that information was false.

The plaintiffs' claim that Boise had misrepresented its financial condition to this court was not set forth in plaintiffs' complaint, but rather was made for the first time in response to these motions to dismiss. At that time plaintiffs had no basis for challenging the veracity of Boise's representations other than their disbelief. Subsequently, plaintiffs sought to buttress their claims with the submission of the affidavits of Lee P. Cordon, a certified public accountant, and William Kelly, an attorney specializing in matters relating to insolvency and bankruptcy.

Based upon "understandings" regarding Boise's assertions of possible bankruptcy, "society's reluctance to allow large companies to be liquidated," his analysis of the Cleary affidavit,[15/] and Boise Cascade's 1972 annual report, Mr. Cordon concluded,

> (1) the likelihood that Boise would have become bankrupt if there had been no settlement of the McCubbrey action at the time when that settlement actually occurred is nil;
>
> (2) Boise could have paid an additional $100 million in settlement over and above what it actually committed itself to pay at that time;
>
> (3) Boise could have paid the face value of the outstanding claims, which I am advised was approximately $350 million, without having to suffer liquidation;
>
> (4) Boise ultimately would have been able to pay a judgment of as much as $500 million to $1 billion, although this obviously would have been a

> devastating blow which it could not have absorbed immediately.

Mr. Cordon's analysis is seriously flawed in at least two respects. First, he ignores his own caveat that

> an analysis of financial statements cannot fully indicate the ability of a company to withstand an adverse event. In order adequately to investigate the ability of Boise to pay a settlement or a judgment, it would have been necessary to secure the present value of its assets as opposed to the book value which reflected on its financial statements.

Second, Mr. Cordon's opinion of Boise's ability to withstand a judgment substantially in excess of that provided for in the McCubbrey settlement appears to be based upon Boise's financial condition after its debts were restructured thus ignoring the connection between the restructuring and the settlement.

In marked contrast to Mr. Cordon's opinion is that of Mr. Kelly who was presented with the same documents given to Mr. Cordon, as well as with Boise Cascade's prospectus filed with the SEC on May 7, 1970, and the corporation's registration statement.

> Assuming that the documents described above accurately portray the financial condition of the entities which are described therein at the time to which they refer, I cannot advise you whether or not Boise would have filed a proceeding under the Bankruptcy Act in the absence of the settlement which, in fact, occurred. It is not possible for me to calculate the minimum amount of a settlement or judgment which could be described as sufficiently large to result in the probable bankruptcy of Boise without consultations with qualified accountants and other experts and a far more extensive investigation than I have thus far had time to perform. The same is true with regard to reaching any conclusion concerning the probable effect of a Boise bankruptcy or insolvency proceeding

upon members of the class. Such consultations and investigation also would have been necessary to make these determinations at the time of the settlement. Initially, a complete review of each of the Boise entities and analysis of its assets, as well as its liabilities (particularly secured liabilities) would have been required. I am assuming that the possibility exists that one, some or all of the entities would have filed proceedings under some provision of the Bankruptcy Act. Analysis would have been required with respect to each entity relative to each of the proceedings available under the Act; assuming that each entity is a corporation, these include straight bankruptcy and proceedings under Chapters X and XI of the Act.

In order to make such an analysis, it would be and would have been necessary to be completely familiar with the interrelation between each of the entities. As secured financing is a major factor with regard to each of the entities, review of the loan documents and the amendments thereto would have been required.

> As I understand it, the question of the likelihood that Boise would have filed a proceeding under the Act would have been influenced substantially by the probable conduct of one or more of the major secured lenders in the event that there had been a large settlement with, or judgment in favor of, the class. Even with a complete knowledge of the structure of the companies, their assets, liabilities and relative circumstances, and even with a knowledge of the nature and status of the secured financing arrangements, neither I nor any insolvency specialist known to me would be qualified to predict the probable action which would have been taken by such secured lenders, and their own statements in these regards could not properly have been taken at face value. In order accurately to make such predictions, one would require consultation with disinterested persons having high-level banking experience and preferably persons with considerable familiarity with the history of the Boise financing problems. (Emphasis added.)

Mr. Kelly's opinion was concurred in by Irving J. Sulmeyer, a bankruptcy specialist who stated, in response to plaintiffs' questions,

> We tend to agree with the affidavit of William Kelly above referred to, that it is impossible to state with any reasonable assurance from the documents submitted to us, whether or not a voluntary or involuntary proceeding under the Bankruptcy Act with respect to Boise Cascade Corporation and/or its wholly-owned subsidiary Boise Cascade Home and Land was imminent at the time the District Court made its preliminary order of approval in March of 1973, or its final order of approval in May of 1973. In our opinion, any conclusion as to the imminence of a proceeding under the Bankruptcy Act by or against the Boise Cascade entities at that period of time in 1973, would be purely speculative.

Neither these affidavits nor the newspaper article[16/] submitted by plaintiffs provide any evidence that a fraud was committed upon this court. With respect to the attorney defendants, the affidavits may be of some relevance to the plaintiffs' claim that the attorney defendants' evaluation of the significance of Boise's financial condition was faulty. As indicated above, however, therein lies no basis for a claim of fraud on the court. With respect to Boise's conduct, the Kelly affidavit suggests the possibility that Boise's lenders in fact might not have accelerated the payments owed them and hence Boise's fears may have been somewhat exaggerated. That possibility does not contradict any of the representations made to the attorney defendants or this court. And it is hardly unusual for parties and their attorneys to characterize the facts in the manner most advantageous to their position. But as long as those positions are taken in good faith, and the underlying facts are not misstated, that is advocacy, not fraud on the court.

Contrary to plaintiffs' assertions, the fact that they have not had an opportunity for discovery[17] to find "further" evidence of fraud on the court does not preclude our rejection of their charges.

It is well established that one who alleges fraud of any kind must have good reason to believe that a fraud has occurred. This principle is incorporated in rule 9 of the Federal Rules of Civil Procedure. As an exception to the notice pleading standards that otherwise govern the adequacy of complaints in the federal courts, rule 9 requires that "[i]n all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity."

The possibility that discovery will provide evidence of fraud is no defense to a motion to dismiss for failure to comply with the strictures of rule 9. Thus, for example, the district court in Rich v. Touche Ross & Co. 68 F.R.D. 243 (S.D. N.Y. 1975), denied plaintiff's request that a ruling on defendant's motion to dismiss be delayed pending discovery:

> Such a tactic is impermissilbe. "A complaint alleging fraud should be filed only after a wrong is reasonably believed to have occurred; it should serve to seek redress for a wrong, not to find one." Segal v. Gordon, supra, 467 F.2d at 607-08 [2d Cir. 1972]. See also, Segan v. Dreyfus Corporation, 513 F.2d 695 (2d Cir. March 28, 1975); Lewis v. Varnes, 368 F. Supp. 45 (S.D.N.Y. 1974).

Id. at 247. Accord Clinton Hudson & Sons v. Lehigh Valley Cooperative Farms, Inc., 73 F.R.D. 420, 424 (E.D. Pa. 1977). When the charge is fraud on the court, our interest in finality of judgments makes it all the more imperative that such a charge not be countenanced when it is based on suspicion alone.

In H. K. Porter Co. v. Goodyear Tire & Rubber Co., 536 F.2d 1115 (6th Cir. 1976), the Sixth Circuit dealt with the precise question posed by the plaintiffs in this case, i.e., the appropriateness of postjudgment discovery. In the course of its analysis, the court first noted the paucity of authority concerning this question. We too have found few cases other than Porter, that are closely on point. But this is significant in itself because it underscores the fact that a litigant alleging fraud on the court usually comes into court with evidence obtained subsequent to the entry of judgment. The question then is whether that evidence demonstrates fraud on the court.

In marked contrast, the charge of fraud on the court in this case was made for the first time in response to motions to dismiss. As we have shown, plaintiffs have no evidence to support the few allegations that might possibly rise to the level of fraud on the court. Instead, apparently operating under the old adage that the best defense is a good offense, they have demanded that the defendants prove that there was no fraud on the court.

Alternatively, plaintiffs demand that this court provide them the means to substantiate their claim that such fraud occurred. In Porter, supra, the district court refused to allow plaintiffs to engage in such discovery absent some evidence that a fraud had indeed been committed. In affirming that decision, the Sixth Circuit stated,

> we must recognize that a request for discovery for the purpose of attacking a final judgment involves considerations not present in pursuing discovery in a pending action prior to a judgment. Primary among these considerations is the public interest of the judiciary in protecting the finality of judgments.

Id. at 1118. This "primary" consideration is even more pressing in a class action context where "[f]inality of judgments is especially important." Comment, supra at 1247.

Had the plaintiffs presented some evidence of fraud on the court, we think these considerations might be sufficiently outweighed by the countervailing public interest in "preservation of the integrity of the judicial process," Hazel-Atlas, supra, 322 U.S. at 246, to warrant withholding our decision pending further discovery. That, however, is not the case, as plaintiffs here, like the plaintiffs in Porter presented no evidence of fraud on the court. As the district court judge in Porter stated, "'No party to a proceeding may begin a new round of procedural attacks on a judgment without demonstrating good cause for those attacks.'" Porter, supra at 1121. Cf. Lockwood v. Bowles, 46 F.R.D. 625, 633 (D.D.C. 1969) ("Except in extraordinary circumstances such as those truly contemplated by the term "fraud on the court" in rule 60(b), the law favors an end to lawsuits rather than a free reopening and retrial of them.").

As the court that presided over the McCubbrey settlement, we were in a position to study and consider closely the conduct of the attorneys and of the litigants in that action. We remain convinced that the representation provided there was of the highest quality and that the McCubbrey settlement was

> an extraordinary imaginative and resourceful resolution of a very complex and protracted matter and series of matters that have confronted many courts in the State and two federal courts. It has all of the ingredients of a settlement that neither side can be totally happy with, entirely happy with the results. It would not be a settlement if it were otherwise.

Hearing May 15, 1973 (RT 80-81.)

III

We turn now to the merits of these motions to dismiss and/or for summary judgment, with particular emphasis on the res judicata defense raised by the defendants.

The more detailed analysis that follows supports our conclusion that this action is in the main barred by the McCubbrey judgment as to all defendants except Hidden Valley Lake Properties, Inc. and the directors of the Stonehouse Mutual Water Company.[18] (The latter were not defendants in the McCubbrey action.) Plaintiffs' own complaint seems to concede that the heart of the current lawsuit is based upon the same conduct that gave rise to the actions that were settled in 1973: paragraph 141 of count XVI, which alleges breach of the settlement agreement, states in relevant part,

> In fact, said defendants [the Boise defendants, Hidden Valley Lake Association, Stonehouse

> Mutual Water Company and Pine Mountain Lake Association] continued and intended to continue in their previously existing course of illegal and tortious conduct and, specifically, defendants intended to and did act as follows:
>
> . . . .
>
> c) defendants did not cease their illegal actions. [sic] but, to the contrary, continued them as is alleged in Counts I through XV above.

The relief sought for this allegedly illegal conduct is basically the same as the McCubbrey prayer, which, inter alia, asked for rescission of the land sales contracts, damages where appropriate, rescission of obligations to pay assessments levied by the homeowners' associations and the water company, and discharge of the liens that those defendants had obtained.

Many of the legal theories and

grounds for recovery underlying the plaintiffs' claim for relief differ from those set forth in McCubbrey. That, however, does not preclude application of the doctrine of res judicata, for as stated in Mirin v. Nevada ex rel., Public Service Commission, 547 F.2d 91, 94 (9th Cir. 1976), cert. denied, 432 U.S. 906 (1977), a prior valid judgment

> operates as an absolute bar to a second suit between the same parties or their privies based on the same cause of action not only in respect of every matter actually litigated, but also as to every ground or recovery or defense which might have been presented.

Accord, Scoggin v. Schrunk, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976) (prior judgment "serves not only to bar every claim that was raised in state court but also to preclude the assertion of every legal theory or ground for recovery that might have been raised in support of the granting of the desired relief."); _cf_. Restatement of Judgments § 61(1) (Tent. Draft No. 5, 1978) ("the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose."). Furthermore, consideration of a _res judicata_ defense is appropriate even though the _McCubbrey_ judgment was based upon a stipulated settlement. _Green v. Ancora-Citronelle Corp._, No. 76-1433 (9th Cir., June 8, 1978).

Plaintiffs seem to argue that there is a basic unfairness in applying _res judicata_ when the prior judgment was a class action settlement.[19/] But the very purpose of the procedural safeguards set forth in rule 23 of the Federal Rules of Civil Procedure is to mitigate the sometimes harsh consequences of res judicata by requiring that representation, and, where applicable, notice be adequate. Cf, Gibson v. Local 40, Supercargoes and Checkers of ILWU, 543 F.2d 1259, 1265 (9th Cir. 1976) ("There is 'a duty upon the court to consider carefully the requirement of fair and adequate protection in view of the serious consequences of res judicata in class actions.'") (quoting EEOC v. Detroit Edison Co., 515 F.2d 301, 311 (6th Cir. 1975) (Title VII class action), vacated and remanded for further reconsideration, 431 U.S. 951 (1977)). If these requirements are met, there are few instances in which a class action defendant should not receive the full benefit of the doctrine of res judicata whether based upon a trial on the merits or settlement. Indeed, if any distinction between class actions and non class actions is warranted, one might well argue for more liberal application of res judicata based upon a class action settlement wherein the requirement of court approval prevents the overreaching that might otherwise occur. Furthermore, restricting the res judicata effect of class action settlements would lessen a defendant's incentive to settle, which would be unfortunate for reasons recently noted by the Ninth Circuit:

> It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits which are now an ever increasing burden to so

> many federal courts and which frequently present serious problems of management and expense.

Van Bronkhorst v. Safeco Corp., 529 F.2d 943 (9th Cir. 1976) (footnotes omitted); United States v. McInnes, 556 F.2d 436 (9th Cir. 1977).

A. Antitrust Claims

The defendants' assertion that counts I through VI of plaintiffs' complaint "are an attempt to drape antitrust trappings on previously discharged misrepresentation claims" is well taken. Many of these allegations fail to state a cause of action under the antitrust laws and to the extent that they do, they are barred by the McCubbrey judgment and the releases given the McCubbrey defendants.

Counts I and II of the Valerio complaint allege violations of sections 1 and 2 of the Sherman Act, respectively. Count I in particular is perhaps the best example of the plaintiffs' sometimes clever often ludicrous attempts to reshape the fraud allegations of the McCubbrey complaint into antitrust claims. Count I begins with paragraph 28, which in essence is a summary of the allegedly false representations made to the McCubbrey class and listed in that complaint. There follow allegations that because of this unlawful conduct the property has decreased in value and the Boise defendants through default and foreclosures, and purchases have reacquired fee ownership of large blocks of the property in the recreational land subdivisions at low prices. Count I contains further allegations that Boise has then proceeded to sell this property to defendants Hidden Valley Lake Properties, Inc. and Mountain Home Properties, Inc.,[20/] at prices lower than those at which Boise sold similar property to the plaintiffs. There also are allegations of exclusive dealing contracts between the above-mentioned defendants, as well as allegations of conspiracies to file baseless lawsuits.[21/]

The gravamen of palintiffs' complaint in count I, that the property is not worth what they paid for it, also was at the heart of the McCubbrey action.[22/] This is demonstrated both by pages 16 to 19 of the complaint which lists 25 allegedly false representations made concerning the "value, resale and investment potential," of the lots sold the McCubbrey class, as well as that portion of the complaint that asked for damages equal to the difference between the purchase price and actual value of the lots as well as the difference between the purchase price and the value of the lot as represented to each class member. Amended McCubbrey Complaint at 51. These facts along with the Valerio complaints' focus on conduct alleged to have commenced in 1967, see, e.g., ¶s 28, 30 and 38, warrant a finding that this count and count II, which alleges an unlawfully obtained and maintained monopoly, are barred by the McCubbrey judgment as well as the release.

We, however, need not rest our decision on that basis alone, for it also is evident that many of the specific allegations of count I fail to state a claim upon which relief can be granted. For example, plaintiff's allegation that the defendants are selling lots at prices lower than what the plaintiffs paid for their own lots does not in itself state a violation of the antitrust laws. And that remains the case even if, as plaintiffs contend in their memorandum, this is construed as an allegation of predatory pricing. As recently stated by the Ninth Circuit,

> Pricing is predatory only where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup lost profits.

Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977). It is difficult to consider the plaintiffs, who between them own three lots, or even the McCubbrey class as a whole, who purchased their property from Boise, as competitors whom the defendants are trying to destroy. Assuming arguendo that plaintiffs are competitors there remains yet another, insurmountable, barrier to stating a claim of predatory pricing in this case: once the defendants and plaintiffs have sold their lots they will all be out of business. In other words, there really is no possibility of recouping lost profits because once a lot is sold, unlike a fungible manufactured product for instance, it cannot be replaced and in most instances the customer is lost, because his needs are satisfied, to both the seller and the competitor whom he is trying to destroy. This is not to say that a large realtor in head-to-head competition with another competitor might not engage in predatory pricing, though we confess we find this rather implausible, but only that plaintiffs not only have failed properly to plead predatory pricing but there are no facts that would support such a claim in this case.

For reasons similar to those stated above, it is equally clear that plaintiffs' section 2 monopolization claim cannot stand. We are unable to comprehend how defendants can have obtained and maintained a "monopoly of marketable recreational land at Hidden Valley Lake and Pine Mountain Lake Subdivisions and in and near Northern California," by selling that very property.

Plaintiffs' allegations that defendants have filed baseless lawsuits also do not state an antitrust claim. Plaintiffs contend that the small claims actions for unpaid assessments were and are baseless because the grounds for venue were false and many of the claims "clearly were barred by the applicable statute of limitations," as well as other matters set forth in the complaint. With respect to the statute of limitations argument, plaintiffs' complaint alleges that plaintiff Valerio has never paid any assessments and plaintiff Chang has paid only those assessments for which defendants obtained a judgment. The complaint further alleges that many of the class members have refused to pay any assessments levied since they first purchased their property. Thus plaintiffs' assertion of a clear statute of limitations bar is refuted by the allegations of their own complaint, including the fact that the defendants have won some of these suits. This latter fact is also relevant to the allegations regarding false venue. But even if plaintiffs' complaint were not internally contradictory, recent decisions have held allegations similar to those of count I insufficient to state a claim for relief.

In Franchise Realty Interstate Corporation v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F.2d 1076 (9th Cir. 1976), cert. denied, 430 U.S. 940 (1977), the Ninth Circuit thoroughly analyzed the "sham" exception to the Noerr-Pennington rule that efforts to influence public or judicial[23/] officials do not violate the antitrust laws even if done for an anti-competitive purpose. United Mine Workers v. Pennington, 381 U.S. 657 (1965); Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961). The court stated,

> The Supreme Court has consistently recognized the sensitivity of First Amendment

> guarantees to the threat of harassing litigation, and has erected barriers to safeguard those guarantees. See, e.g., Time, Inc. v. Hill, 1967, 385 U.S. 374, 387-91, 87 S.Ct. 534, 17 L.Ed. 2d 456; New York Times Co. v. Sullivan, 1964, 376 U.S. 254, 267-83, 84 S.Ct. 710, 11 L.Ed 2d 686; N.A.A.C.P. v. Button, 1963, 371 U.S. 415, 431-33, 83 S.Ct. 328, 9 L.Ed. 2d 405. Because we think that similar values are endangered in this case, we hold that in order to state a claim for relief under the Trucking Unlimited exception, a complaint must include allegations of the specific activities, not protected by Noerr, which plaintiffs contend have barred their access to a governmental body. The deficiencies of McDonald's amended complaint in this regard are evident from what we have said above. Dismissal of that complaint was proper.

Franchise Realty, supra at 1082.

Applying the holding of Franchise Realty, in which the "governmental body" was the Board of Permit Appeals, to a situation involving allegedly sham lawsuits, the district court in Ernest W. Hahn, Inc. v. Codding, 423 F.Supp. 913 (N.D. Cal. 1976), stated,

> Defendants are alleged to have begun "baseless" litigation whose only purpose was the delay or frustration of the project. Whatever their motives in instituting the actions, defendants were obviously seeking official action by a governmental body. By its very nature, litigation is a process which seeks official decision -- a determination on the merits of the action by a court.
>
> . . . .
>
> The most plaintiff has alleged here is that litigation was instituted for an anticompetitive purpose. But an anticompetitive motive is clearly not enough to convert otherwise privileged First Amendment activity into a violation of the Sherman Act.

Id. at 916-17. The court concluded its general discussion with a statement that expresses our own sentiments very well:

> For this court to find that an allegation that litigation has been brought for an anti-competitive purpose states a claim under the antitrust laws would be to go futher than any of the authorities, and would effectively discourage litigants from bringing lawsuits for fear of possible liability under the antitrust laws.

Id. at 917.

Finally, plaintiffs make reference to exclusive dealing contracts between Boise and defendants Hidden Valley Lake Properties, Inc. and Mountain Home Properties, Inc. We believe defendants were overly generous in stating in their memorandum that "plaintiffs have technically pleaded the type of arrangement which is known as an exclusive dealing agreement." As is apparent from their memorandum, defendants have assumed that plaintiffs are complaining of a refusal by defendants to sell plaintiffs' land.

That, however, is not the case. Plaintiffs do allege an agreement

> whereby Hidden Valley Lake Properties, Inc. and Mountain Home Properties, Inc. are the exclusive purchasers and sellers of property and securities at Hidden Valley Lake and Pine Mountain Lake Subdivisions, respectively, which are owned by the Boise defendants, and whereby Hidden Valley Lake Properties, Inc. and Mountain Home Properties, Inc. sell no property at those locations which is owned by any other entity.

Complaint at 15 ¶ 35 (emphasis added). They, however, do not contend that the defendants have refused to market or sell plaintiffs' property; in fact, ¶ 34 states,

> At this time no broker other than defendant Hidden Valley Lake Properties, Inc. will actively attempt to market or sell the above-mentioned real property and securities of plaintiffs or of the class at Hidden Valley Lake Subdivision because of the activities of the

> defendants which are alleged in this complaint. And although entities other than defendant Mountain Home Properties, Inc. will actively attempt to market the above-mentioned real property and securities of plaintiffs and of the class at Pine Mountain Lake Subdivision, they are severely disadvantaged in so doing because of the above-mentioned activities of the Boise defendants and defendant Mountain Home Properties, Inc.

(emphasis added). Thus, even if these claims were not otherwise barred, they fail to state a claim by plaintiffs Valerio and Chang against the defendants.

The appropriateness of summary judgment for the defendants is most clear with respect to counts III, IV, V and VI. Count VI purportedly is a claim under the Robinson-Patman Act for price discrimination in the sale of real property and securities by the defendants. It suffices to say that real estate and intangibles are not commodities within the meaning of the Act. Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251, 252 (6th Cir. 1970), cert. denied, 400 U.S. 1000 (1971); Ernest W. Hahn, Inc. v. Codding, 423 F. Supp. 913, 919 (N.D. Cal. 1976) (real estate); Baum v. Investors Diversified Services, Inc., 409 F.2d 872, 875 (7th Cir. 1969) (mutual fund shares). Counts III, IV and V, which plaintiffs have denominated "Sherman and Clayton Act Claims" are not cognizable, under the Clayton Act, for similar reasons.

While the allegations in these three counts are hardly paragons of clarity, in essence they assert tie-ins between the sales of lots on the one hand and the memberships in the homeowners' associations, the shares in the Stonehouse Mutual Water Company and the acquisition of the Hidden Valley Lake Country Club on the other hand. Section 3 of the Clayton Act, 15 U.S.C. § 14, however, requires that the items involved be "goods, wares, merchandise, machinery, supplies or other commodities." 15 U.S.C. §14. Since real estate is not a commodity, plaintiffs cannot state a cause of action under the Clayton Act. Moore v. Jas. H. Matthews & Co., 550 F. 2d 1207, 1214 (9th Cir. 1977) (tie-ins involving cemetery losts; "A better rule is that § 3 applies only if both the tying and tied items fit the definition."). See Northern Pacific Railway Co. v. United States, 356 U.S. 1, 13 & n.1 (1958) (Harlan, J. dissenting); L. Sullivan, Handbook of the Law of Antitrust 433 (1977) ("It [§ 3] presumably has no application ... to land transactions ..."). Such claims might conceivably state a claim under Section 1 of the Sherman Act, *see* *Northern Pacific*, *supra*; *Moore*, *supra*, but we find that they are barred by the *McCubbrey* judgment and/or release.

Count XV of the amended *McCubbrey* complaint alleged that the class members were entitled to recover all assessments already paid to homeowners' associations and the water companies to be relieved of liability for such assessments, and to have liens for such assessments removed or subordinated to class members' equitable venders' liens upon their lots. The *McCubbrey* class based their claim that the assessments were invalid on the facts alleged in the complaint, which included alleged misrepresentations regarding utilities and recreational amenities.

Among the latter, were representations

> That Boise would contruct or provide or improve certain recreational facilities at no cost to lot owners
>
> . . . .
>
> That recreational facilities and amenities at certain projects would be turned over to property owners' associations at no cost to such associations;

Amended McCubbrey Complaint at 21, 24. These same allegations were among those listed in the notice that was sent to plaintiffs Valerio and Chang, which not only advised them that these were matters raised in the lawsuit and denied by defendants, but also that

> If you file a claim you will have done so in full and final satisfaction of all known, unknown, present and future claims of any kind which arise from your purchase of property at any of the Boise projects, and which are raised or could be raised in the amended complaint . . . .

Plaintiffs Valerio and Chang seek relief, i.e., an order discharging liens obtained by the defendants and giving plaintiffs a refund of assessments already paid, that is similar to that sought in McCubbrey. The alleged antitrust violation that underlies their request is but another legal theory that could have been asserted, and probably would have been asserted had the McCubbrey class's attorneys thought it to be of any merit, in support of the allegations of count XV of the McCubbrey complaint. And, as we already have stated, the effect of a prior determination cannot be avoided by "'clothing the claim in different garb.'" In re Orbitec Corp., 392 F. Supp. 633, 636 (S.D.N.Y. 1975).

Admittedly, count III alleges conduct, the acquisition of the Hidden

Valley Lake Country Club by the Hidden Valley Lake Association, that occurred after McCubbrey was settled. It is unclear how this allegation could under any circumstances state a tying claim as it appears that it is but a consequence or the original tie-in, assuming arguendo there was one, between the lots and the memberships in the homeowners' associations. In any event, this claim is barred by the McCubbrey judgment for, as shown above, the plaintiffs' primary complaint that the country club, which operates at a deficit, imposed unwanted costs upon the associations' members, was very much an issue at the time McCubbrey was settled. Indeed, at the time of the settlement, negotiations for the transfer of the Hidden Valley Lake Country Club to the association were underway, and this was mentioned by one objector at the fairness hearing, held on May 15, 1973, in a context that made it very clear that this claim was covered by the settlement:

> At the present time, Boise Cascade is attempting to make the Hidden Valley Lake Association-- that is the property owners--take over the golf course and the club house. The operating expenses of the golf course are over $100,000 a year, and the cost of operating the club house is not known to me, but it operates at a loss.
>
> . . . .
>
> There is no way that the Hidden Valley Lake Association can operate the aforementioned recreation facilities without a tremendous financial burden being put upon the users of the facilities.
>
> Therefore, I ask that the settlement be amended so that restitution or relief be given to the users of the facilities.

(RT 36-37. Comments of J. J. Cabezud, objector to the McCubbrey settlement.)

At this court's request counsel for the plaintiffs responded as follows to this matter and Mr. Cabezud's concern about the improvements he had made on his property:

> Your Honor, we have, in connection with the problem of the costs to the home owners on the Home Owners Association and restrictions, the committee has had an independent investigation made of the deed restrictions in the Hidden Valley Lake project. It is our opinion that costs that are being complained about, which are included in the restrictions, in the Association restrictions, are payable pro rata by the owners of the lots. Those would include those lots which were owned by Boise before they were sold, and those lots which Boise may take back and buy, return through this process, or any other process.
>
> So I think that we are saying as far as the legality is concerned, in our view, the costs are spread over the lots. To the extent that Boise gets lots back, they would increase their pro rata share.

. . . .

> THE COURT: Mr. Elke, take this gentleman's case, can he tender the house and lot back and receive the value of the improvements and the lot?
>
> MR. ELKE: No, Your Honor, he cannot do that.
>
> THE COURT: Then what is his recourse?
>
> MR. ELKE: His recourse, to the extent that he has been harmed, and I certainly, from hearing him, I am convinced he thinks he is, would be an independent suit, Your Honor, I think.
>
> . . . .
>
> . . . I cannot here say that I would advise this gentleman to do anything other than opt out.

(RT 38-40.)

We thus are confident in holding that counts III through V are barred by the McCubbrey judgment quite apart from the effect that the release has on these claims.

Counts VII and VIII are denominated pendent claims of unfair competition. As with most of the other pendent claims these can be and are dismissed as a consequence of the failure of the federal claims upon which this court's jurisdiction was invoked. Toensigg v. Brown, 528 F.2d 69, 72 (9th Cir. 1975). We note also, however, that count VII, which conclusionally alleges predatory pricing would be deficient for reasons stated earlier. Furthermore counts IV and V of the amended McCubbrey complaint specifically pled violations of the California Unfair Practices Act and claims of unfair competition, respectively. Thus, an alternative basis for our holding is that counts VII and VIII, which is based upon the defendants' failure to disclose in their advertisements and circulars that the property and securities being sold are required to be registered but are not so registered, see below, are barred by the McCubbrey judgment and release.

B. Securities Claims

In counts IX through XIV of their complaint, plaintiffs allege violations of state and federal securities laws. Count IX defines the securities involved as the plaintiffs' interests in their lots, their assessable memberships in the homeowners' associations (these memberships are received automatically when a buyer purchases a lot) and their shares in the Stonehouse Mutual Water Company, which is an entity owned by the members of the Hidden Valley Lake Association. The gravamen of count IX, as stated in paragraph 102, which is incorporated by reference in the other securities counts, is that the defendants concealed their failure to register these securities.

The other alleged securities violations are as follows: Count X alleges a failure to deliver a prospectus that satisfies the requirements of § 10 of the Securities Act of 1933, 15 U.S.C. § 77(j). In Count XI plaintiffs allege a number of misrepresentations and omissions allegedly made in connection with the sales of these securities: defendants, inter alia, allegedly asserted that the sales were lawful when in fact they were not; they omitted to state that the securities were required to be registered; they omitted to state "that the sale of the issue of which it is a part is unlawful and voidable," etc. Count XII alleges a violation of 15 U.S.C. § 77(q),[24/] and it also seems to allege a violation of rule 10(b)(5) though this is not explicitly stated. Count XIII, however, does allege a violation of rule 10(b)(5): that the failure to disclose the nonregistration of the securities was a fraud upon the plaintiffs. Finally, count XIV alleges a violation of the California Corporate Securities Act in that "[e]ach such security was sold and is being offered for sale and sold by means of an untrue statement of a material fact and by means of an imission [sic] to state a material fact, as alleged above."

In counts II and VI, the amended McCubbrey complaint also alleged violations of federal and state securities laws respectively. There was no attempt, however, to parse out the homeowners' association memberships and the shares in the water company as separate securities. Instead, count II alleged that the lots purchased from the Boise defendants, and the class members' investments made by purchasing those lots constituted securities within the meaning of section 3(10) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(c)(10), and section 2(1) of the Securities Act of 1933, 15 U.S.C. § 77b(1). Whereas the emphasis in Valerio is upon failure to register these securities and other technical shortcomings, and concealment thereof, the focus in McCubbrey was in a practical sense much broader. Count II alleged that the defendants violated section 10(b)(5) of the Securities Exchange Act, 15 U.S.C. § 78(j)(5) and sections 12(2) and 17(a) of the Securities Act, 15 U.S.C. § 77(1)(2) and 77(q)(a), by engaging in other fraudulent practices all in connection with the sale of the above-mentioned securities. Paragraphs 25 and 26 of the McCubbrey complaint, which were incorporated by reference into count II, listed at great length (31 pages) many of the allegedly false and misleading representations made by the defendants, to induce the McCubbrey class to enter into land sales contracts.[25/]

Plaintiffs make two arguments against the application of res judicata to these claims. First, they contend that doctrine is inapplicable in light of section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, which states,

> Any condition, stipulation or

> provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void.

In support of their position, plaintiffs cite Pearlstein v. Scudder & German, 429 F.2d 1136 (2d Cir. 1970), cert. denied, 401 U.S. 1013 (1971), wherein the Second Circuit relied in part on a similar provision of the 1934 Act to deny the res judicata effect of a settlement obtained in an earlier suit brought by the defendant against Pearlstein. Pearlstein, however, is easily distinguished from the instant case, because the McCubbrey settlement, in contrast to the Pearlstein settlement does not itself violate the Act. The implication in plaintiff's argument that any settlement of a securities action can be given no legal effect is simply untenable. As stated in Murtagh v. University Computing Company, 490 F.2d 810, 816 (5th Cir.), cert. denied, 419 U.S. 835.

> [S]ettlements of claims arising from acts which are violations of the securities laws are not void as a matter of law, at least where such settlement agreements do not themselves continue the precise conduct which violates the law.

(emphasis added). Accord, Cohen v. Tenney Corp., 318 F. Supp. 280, 284 (S.D. N.Y. 1970). We note also that the Ninth Circuit in Green, supra, did not hesitate to apply collateral estoppel based upon a prior settlement in state court, to plaintiff's federal securities action.

Plaintiffs' second argument is that McCubbrey does not bar their securities claims because some of the sales took place after that settlement. Plaintiffs Valerio and Chang do not deny that they purchased their lots and received their memberships in the homeowners' associations and their shares in the water company prior to the McCubbrey settlement. They, however, argue that the annual assessments made by the associations and the water company constitute the offer and sale of a security, and hence by failing to register these securities, deliver prospectuses, etc., the defendants have committed post-McCubbrey securities violations.

For many of the same reasons stated earlier, we do not believe that the plaintiffs can so facilely avoid the res judicata effect of McCubbrey. Count XV of the amended McCubbrey complaint alleged that the assessments payable to the property owner's associations and water companies were invalid. It is apparent that the plaintiffs here are simply attempting to relitigate that issue under the guise of a new, rather novel, theory. It might be of some relevance to a statute of limitations defense, but it does not preclude us from holding that plaintiffs' securities claims are barred by the McCubbrey judgment.

C. Pendent Claims

As stated earlier, plaintiffs' pendent claims properly may be dismissed without further analysis. For most of them, however, there are other independent grounds for ruling in defendants' favor and we briefly note these.

Count XV alleges that the attorney-defendants and the Boise defendants induced the McCubbrey class to enter into the settlement agreement by misrepresenting and concealing material facts. As clarified by plaintiffs' memoranda and explicitly stated in plaintiffs' proposed amended complaint, defendants alleged liability arises out of the preparation of the notice sent to the McCubbrey class. We already have rejected these alleged deficiencies as a basis for a finding that the notice did not satisfiy due process. We doubt that plaintiffs could nevertheless state a claim for fraud, but we need not decide that issue for this claim is barred as to the Boise defendants for the same reasons that we held it time barred as to the attorney defendants.

Count XVI alleges that the Boise

defendants, the defendant homeowners' associations and the Stonehouse Mutual Water Company had no intention to and have not complied with the terms of the settlement agreement. With respect to the homeowners' associations and Stonehouse, it suffices to say that they were not parties to the settlement agreement itself. As for the Boise defendants, to the extent that plaintiffs' complaint is that the McCubbrey settlement has been violated, their remedy lies first with the Attorney General as provided for in paragraph E-5 of the settlement agreement. These statements apply equally to counts XXVI and XXIX, the latter directed solely to the Boise defendants, which more specifically allege breaches of the McCubbrey settlement agreement.

Counts XIX through XXII of the Valerio complaint allege common law fraud based on conduct that is essentially the same as that alleged in the securities counts. It follows, therefore, that these claims also are barred. This also is true of count XXVIII, which alleges that the defendants negligently misrepresented that the sale of securities was lawful.

Count XXIII is based upon the participation of the defendants' attorneys in the drafting of the amended McCubbrey complaint. Plaintiffs contend that those attorneys thereby incurred fiduciary duties to the McCubbrey class, which duties were violated by, inter alia, failing to include all causes of action that had then accrued to the plaintiffs. We are somewhat puzzled by this complaint since if there is any problem in having defendants participate in the drafting of the complaint, it would be that they would tend to be overly inclusive in order to protect their clients from future litigation. In any event, plaintiffs have failed to state a claim for relief here. It is hardly unusual for defendants' attorneys to participate in the drafting of the amended complaint that will be the basis of the settlement. See Haudek, The Settlement and Dismissal of Stockholders Actions - Part II: The Settlement, 23 Southwestern L.J. 765, 773 (1969). See also Pergament v. Frazer, 93 F. Supp. 13, 20 (E.D. Mich. 1950).

The claims stated in counts XXVII and XXX arise out of the acquisition of the Hidden Valley Lake Country Club by the Hidden Valley Lake Association, allegedly in breach of the "original agreement of sale." These claims are barred by the McCubbrey judgment for the reasons stated in our discussion of plaintiffs' tying claim based on this same conduct.

Finally, counts XXXII through XXXVII center around the validity of the assessments levied by the homeowners' associations and Stonehouse Mutual Water Company. The last four counts, specifically, are listed under the heading "Pendent Declaratory Relief Against Small Claims Actions and the Collecting of Assessments by Methods Not Approved by Law." Count XIV of the amended McCubbrey complaint was for declaratory relief concerning the respective rights and duties of the defendants and the class, and, as noted earlier, count XV of the McCubbrey complaint specifically challenged the validity of the assessments. Thus these claims are barred by McCubbrey for these reasons and others discussed elsewhere in this opinion. We note further that even if these claims were not barred by McCubbrey we most likely would decline to exercise jurisdiction over these challenges to the methods by which the assessments have been collected. That is a question best decided by state courts.

IV

There remain to be decided the plaintiffs' motion to amend their complaint and their requests for subpoenas duces tecum and various other discovery to prove their claim of fraud on the court. The latter question obviously is moot in light of our rulings. Our decision also dictates denial of the motion to amend.

In most instances leave to amend a pleading is given freely. But amendment properly may be denied where, as here, the amended complaint is as vulnerable to motions to dismiss and for summary judgment as the original. See e.g., Foman v. Davis, 371 U.S. 178, 182 (1962); Bricker v. Crane, 468 F. 2d 1228, 1233 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973). Many of the proposed amendments are designed to meet the defendants' statute of limitations arguments. They of course would not alter our decision here since it is not based on statute of limitations. Nor would these amendments be relevant to our earlier decision, which was based on that defense, in light of our determination that the statute of limitations on the claims against the attorney defendants began to run at the very latest, in the fall of 1973 when plaintiffs received their settlement checks. Other amendments to existing counts include an expansion of paragraph 102 (count IX) to list all of the means by which defendants allegedly concealed their failure to register securities, and, as mentioned earlier, paragraph 132, as amended, centers around alleged misrepresentations and concealments in the notice. Paragraph 132 also states additional misrepresentations that were not mentioned in the original complaint. These amendments also have no bearing on our rulings.

The most substantive changes effected by the proposed amendment are the addition of claims for fraud on the court and for inadequate representation. The latter count includes an allegation that the notice to the class did not satisfy the requirements of due process. The substance of those counts, however, was stated in plaintiffs' memoranda and the questions raised thereby necessarily were decided by this court in ruling on the merits of the defendants' motions. It would be a useless act to allow these amendments. This is equally true of plaintiffs' allegations of satisfaction or attempted satisfaction of the prerequisites for filing a lawsuit against the Attorney General: our decision in the

Attorney General's favor was not based on lack of jurisdiction.

The motion to amend, therefore, is denied.

CONCLUSION

In substance, if not in form, the gravamen of plaintiffs' lawsuit is that the McCubbrey settlement was inadequate. There perhaps are many who, with the benefit of hindsight, might well agree with that position. In 1973, however, we were satisfied not only with the adequacy of the representation and notice given the class but also with the adequacy of the settlement. The plaintiffs could have challenged our conclusion in the Ninth Circuit Court of Appeal. They chose not to do so. They cannot now relitigate that issue behind a rhetorical smokescreen of fraud and conspiracy.[26/]

It is hereby ordered that the motions for summary judgment of the "Boise defendants,"[27/] Pine Mountain Lake Association, Hidden Valley Lake Association, Stonehouse Mutual Water Company and its directors are granted.

It is further ordered that the motion to dismiss of defendant Hidden Valley Lake Properties, Inc. is granted.

IT IS SO ORDERED.

Dated: August 22, 1978

/s/ ROBERT F. PECKHAM
United States District Judge

FOOTNOTES

1/ This "history" is based upon the record in McCubbrey, of which we take judicial notice. Shuttlesworth v. Birmingham, 394 U.S. 147, 157 (1969); Egan v. Teets, 251 F.2d 571, 577 n.10 (9th Cir. 1957); cf. 9 C. Wright & A. Miller, Federal Practice and Procedure § 2410 at 359(1971) ("the power of a court to take judicial notice of its own records is amply established").

2/ The history of Boise's financial predicament is summarized in the affidavit of Edward W. Cleary, who at that time was Vice President and Treasurer of Boise Cascade Corporation. This affidavit was submitted to this court on May 14, 1973, and is Appendix A to this memorandum and order.

3/ We, however, think that the most likely result would have been to induce more people to opt in rather than, as plaintiffs apparently assume, opt out of the class action settlement.

4/ The fund was equal to $24,000,000 "plus (a) 24% of the aggregate original retail purchase prices of the property owned by all owners, plus (b) 12% of the amount, if any, by which $22,500,000 is exceeded by the aggregate of all claimants' note balances as of the computation date." Settlement Agreement ¶ G-2. As explained at the May 15, hearing, "The fund [$24,000,000] grows to the extent that Boise is obtaining land back. So that within the concept of net asset drain, the fund probably ranges in the vicinity of $30,000,000. That is an IRS estimate." Hearing May 15, 1973 (RT 22).

5/ For example, plaintiffs contend that the notice violated due process because it "implied that there was a reasonable likelihood that a claimant might receive a recovery in the range of 60%-100% of his investment, when in fact there was no such likelihood and the attorneys knew it." As stated above, the notice set forth the possible methods of distribution and the circumstances that would bring each method into play. It also stated, twice, that "method Three will NOT be used UNLESS the number and combined amounts of all claims are too high to permit use of Method One of Method Two." This was merely a statement of fact, the purpose of which was to point out that while claimants would keep their property under method number three that method would be used only if methods one and two were not. Cf. In re Gypsum Antitrust Cases, 565 F.2d 1123, 1125 n.1 (9th Cir. 1977).

Plaintiffs also argue that the notice was defective because it "failed to disclose that the Boise defendants had agreed to pay $2 million in attorneys' fees (not 'up to' $2 million as represented in the notice, but exactly $2 million), plus $22,500 which they represented in the settlement agreement as being part of the costs of administration, but which, in fact, were additional attorneys' fees." Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendants' Motions for Summary Judgment at 9 (Aug.10, 1977) [hereinafter "Plaintiffs' Memorandum of August 10"] (emphasis in original). Both the notice and the Settlement Agreement made it clear that the $2,000,000 was intended to cover costs and attorneys' fees. As for the dispute over the $22,500 it is merely a question of characterization that is of no constitutional significance. (See our discussion of this matter at the hearing of July 15, 1977 (RT 69-97, esp. pp. 96-97).

6/ Deposition of Michael Valerio at 26-27.

7/ Plaintiffs contend that their opportunity to participate would not have been very meaningful because several relevant documents, e.g. the Cleary affidavit, were not filed until shortly before the hearing; hence they would not have had time to engage in meaningful discovery. Plaintiffs, however, cannot be heard to complain that they had no opportunity to develop a record when they never made any attempt to do so. Compare Girsh v. Jepson, 521 F.2d 153, 157-58 (3rd Cir. 1975) (objector "made repeated efforts, through timely filed motions, to obtain answers to her interrogatories and to continue the date of the settlement hearing ... she did everything within her power to prepare for the settlement hearing."), with Kohn v. America Metal Climax, Inc., 489 F.2d 262, 264 (3rd Cir. 1973) (distinguished in Girsh, 521 F.2d at 158 n.9) (contentions that procedural incidents of hearing were inadequate rejected where "appellants did not seek discovery prior to the hearing, or seasonably request additional time to prepare for examination of witnesses ... Moreover, the appellants did not utilize the opportunity prior to the hearing to marshall any evidence indicating that the settlement should not receive court approval or to analyze in any way the vast amount of evidence already in the record ... "

8/ Indeed, prior to filing the instant lawsuit, the plaintiffs' major concern with any matter touched upon by the lawsuit, apart from their unhappiness over the amount of their claim checks, was their continuing liability for lot assessments. Because of their refusal to pay these assessments, the plaintiffs have been and are the defendants in several small claims actions filed by some of the defendants herein: Pine Mountain Lake Association, Hidden Valley Lake Association and Stonehouse Mutual Water Company. Following the filing of those actions, the plaintiffs consulted their present counsel and subsequently filed this lawsuit naming 28 defendants and seeking $1.8 billion in general and punitive damages, as well as an order setting aside the McCubbrey judgment.

9/ If anything, the equities of the plaintiffs' position here are less than those of the appellants in Marshall. Not only did the plaintiffs here choose not to opt out of the settlement but they did not appear at the fairness hearing, or appeal the court's approval of the McCubbrey settlement. And it was almost four full years after approval of the settlement that they filed this action seeking to play the role of spoilers for a class of approximately 44,000 people.

10/ Plaintiffs' memoranda of May 9, 1978, and May 10, 1978, evidence considerable confusion regarding the effect our earlier opinion had on this issue. Thus in their May 9 memorandum plaintiffs state,

> Certainly, it is true that by granting the motion of the attorney defendants for summary judgment on the ground which

> is set forth in its opinion, this court necessarily has held that at least insofar as the attorney defendants are concerned, there is a period of limitation beyond which actions for fraud on the court are barred.

(emphasis in original). Such a holding was neither expressed or implied in our April 6 order, and on May 10, plaintiffs quoted this same passage of their previous day's memorandum and correctly noted, "However, this court's written opinion which was filed herein on April 6 demonstrates that this is not true."

Plaintiffs, however, are still confused about the scope of our April 6 opinion. It was not, as they contend, error to grant the attorney-defendants' motions for summary judgment while plaintiffs' motion for leave to amend to allege fraud on the court was pending. Our earlier opinion held only that the statute of limitations had run on the plaintiffs' causes of action against the attorney-defendants for malpractice and fraud. Although the claims are factually intertwined, the mere fact that we discuss the issue of fraud on the court in this order is conclusive evidence that the contention was not rejected in our earlier opinion.

There is no statute limitations for fraud on the court. And jurisdiction exists to consider such a claim even if there are no adversary parties then present before the court. See C. Wright & A. Miller, Federal Practice and Procedure § 2870 at 250 (1973).

11/ Plaintiffs' Memorandum of Points and Authorities in Opposition to Motions to Dismiss and Reply Points and Authorities in Support of Preliminary Injunction at 4-5 (July 12, 1977) [hereinafter "Plaintiffs' Memorandum of July 12"]

12/ Plaintiffs' Memorandum of July 12, at 7-8.

13/ We have not detected any specific allegation that Boise Cascade's attorneys were a party to the alleged fraud on the court. Thus there is some question whether Boise's conduct could under any circumstances rise above fraud inter partes. See, e.g., United States v. International Telephone & Telegraph, supra, 349 F. Supp. at 29; Lockwood v. Bowles, 46 F.R.D. 625, 632 (D.D.C. 1969) ("we believe the better view to be that where the court or its officers are not involved, there is no fraud on the court within the meaning of Rule 60(b)."). Fraud on the court could establish fraud inter partes, but the reverse is not necessarily true and fraud inter partes unlike fraud on the court is governed by the equitable doctrine of laches, see, e.g., Lockwood, supra at 629, which would be a bar here:

As stated in our April 6 opinion, plaintiffs had actual knowledge of at least one of the major frauds alleged to have been committed on the class as of the date they received their settlement checks in the fall of 1973. And there are good arguments that had plaintiffs exercised due diligence their claims could have been raised even earlier. The Boise defendants clearly have been prejudiced by this delay not only because they proceeded to pay out large sums of money that as a practical matter probably are un-recoverable, but also because of the likely unavailability of many of the witnesses whose testimony would be relevant to the merits of the McCubbrey action.

Our circuit, however, has rejected any mechanical approach to the question of what constitutes fraud on the court as opposed to fraud inter partes. Toscano, supra, 441 F.2d at 933-35. Thus, a party's conduct may be sufficiently egregious, though not involving an officer of the court, to constitute fraud on the court. We believe that affirmative misrepresentations of financial condition in order to obtain court approval of a class action settlement would establish fraud on the court even if Boise's attorneys were completely innocent of any wrongdoing.

But, as stated above, we find no basis for the claim that Boise or its attorneys made any misrepresentations that constitute a fraud on this court.

14/ Plaintiffs' also allege that Boise did not intend to and has not carried out its promises to complete improvements and continue administration and maintenance of the projects. To the extent that this is true, plaintiffs' remedy is set forth in the settlement agreement which grants the Attorney General enforcement powers. There certainly is no fraud on the court here. Plaintiffs' further contention that the attorney-defendants and Boise mispresented the nature of its obligations, i.e., they may illusory promises by stating that they would guarantee completion of the various projects when in fact some of them already were bonded, not only does not state a claim of fraud on the court, but it appears to be refuted by the record in McCubbrey. At the May 15 hearing, the Attorney General stated,

> Much of these amounts [costs of improvements] are bonded to guarantee completion; and, to the extent that they are not bonded, the completion has been guaranteed by Boise Cascade Corporation, ...

Hearing at 17.

15/ See Appendix A.

16/ Exhibit A to the third affidavit of Ernest M. Thayer, plaintiffs' counsel, is a xerox copy of an article that purportedly appeared in the San Francisco Chronicle at or near the time of the McCubbrey settlement. Rather than attempt to summarize its substance, a copy in substantially the same condition as that provided the court is attached as appendix B to this opinion. We do note that part of the article between the end of the first column and the beginning of the second column appears to be missing, and that this missing portion appears to be a discussion of the role the loan agreements played in the McCubbrey settlement.

17/ This court imposed a ban on discovery pending hearing and resolution of Boise Cascade's motion to dismiss or alternatively for summary judgment based on res judicata. As the Ninth Circuit has noted,

> The Supreme Court seems now to be aware of a fact long known to practitioners. The liberal discovery rules of the Federal Rules of Civil Procedure offer opportunities for harassment, abuse, and vexatious imposition of expense that can make the mere pendency of a complex lawsuit so burdensome to defendants as to force them to buy their peace regardless of the merits of the case. The decision in Blue Chip Stamps v.

> Manor Drug Stores, 1975, 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539, an action based on § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the SEC, recognizes this fact and is to be a [sic] considerable extent based upon it:

Franchise Realty Interstate Corporation v. San Francisco Local Joint Executive Board of Culinary Workers, 542 F. 2d 1076, 1083 (9th Cir. 1976). Summary judgment is rarely granted, particularly in an antitrust case, without an opportunity for full discovery by both parties. But it may be appropriate even in the absence of discovery where, as here, the defenses raised, res judicata and statute of limitations, do not go to the merits of the action. Wilmar Poultry Co. v. Morton-Norwich Products, Inc. 520 F.2d 289, 293 (8th Cir. 1975) (citing cases cert denied, 424 U.S. 915 (1976).

We also imposed restrictions on communications between plaintiffs' counsel and members of the proposed class, which has not been certified. This action was taken after plaintiffs' counsel had mailed thousands of letters to Pine Mountain and Hidden Valley Lake property owners. The letter referred to the uncertified action as a class action brought on behalf of the property owners; it made reference to the McCubbrey settlement and its alleged inadequacies; it stated that the relief being sought included an order that would eliminate the assessments being levied upon property and would assure a market for sale of those lots. The letters ended with a request that the recipient fill out the enclosed questionnaire, "[i]n order to prevent the defendants from continuing to levy and collect assessments, and to halt the flood of small claims court lawsuits which they have filed in this connection, ... " The questionnaire dealt primarily with representations made at the time of sale: issues that clearly were covered by the McCubbrey settlement.

Accompanying the letters to the Hidden Valley Lake lot owners was a letter from the secretary-treasurer of the Lot Owners Relief Effort, in which recipients were urged to "assist us all in the new federal court class action concerning Hidden Valley Lake which has just been filed," by filling out the questionnaire sent to plaintiffs' counsel. The letter also stated

> It now appears that there may be a legal solution for those of us who purchased property, awaiting further development of the subdivision, and have found ourselves unable to sell the property, while at the same time we are being burdened, not only with these high assessments, but also with small claims court suits for their collection.

In October, 1977, after full

consideration of the First Amendment implications, we reaffirmed our earlier decision restricting communications and we also continued the stay of discovery.

18/ The complaint, however, contains no charging allegations against the directors who "are sued in their corporate capacity." Thus, given the failure of the claims against Stonehouse, judgment in favor of its directors also is appropriate.

19/ In their July 12 memorandum of points and authorities, plaintiffs state,

> A class action settlement agreement should be construed as an adhesion contract with respect to unnamed class members. Allstate Insurance Co. v. Reeves (1976) 62 Cal. App. 3d 284, 289-290. They are presented with the settlement on a take-it-or-leave-it basis. They do not have the same freedom of bargaining that normal traders do, and the settlement agreement should be strictly construed in their favor.

The cited decision (vacated and reissued at 66 Cal. App. 3d 464, 136 Cal. Rptr. 159 (1977); hearing granted California Supreme Court, March 31, 1977), has nothing to do with class actions or settlements, and the cited pages merely discuss the general principle that "insurance contracts are contracts of adhesion between parties not equally situated."

20/ By stipulation and order dated July 25, 1977, this action was dismissed without prejudice as to Mountain Home Properties.

21/ Plaintiffs also allege "[t]he above-mentioned agreements [exclusive purchaser/seller agreements] between the Boise defendants, Hidden Valley Lake Properties, Inc. and Mountain Home Properties, Inc. ... set and fix prices for real property and securities." Valerio complaint at 17. While plaintiffs allege that defendants' conduct results in the setting and fixing of prices, they do not specifically allege price fixing as a basis for relief. Plaintiffs proceed in their memoranda, however, as if they have alleged price-fixing. Assuming arguendo that they have, we are baffled as to the connection between such an allegation and the remainder of their complaint. If their contention is that defendants have agreed to set prices at an artificially low level, that complaint is subsumed in our discussion of the allegations of predatory pricing. If plaintiffs' contention is that the alleged price-fixing maintains prices at an artificially high level, this would be inconsistent with their other allegations and we fail to see how they, as competitors, could demonstrate any damage arising out of such an agreement.

22/ Although we do not ground our decision on the plaintiffs' depositions, they reveal that plaintiffs have made attempts, both prior and subsequent to the McCubbrey settlement to sell their property. They obviously have not been successful, apparently for reasons unrelated to these alleged conspiracies to destroy them as competitors. For example, when plaintiff Chang, an employee of the San Francisco Zoo, attempted to sell one of his lots in 1970, some realtors told him that "there were a lot of lots that were not sold by Boise Cascade yet, so that I didn't have much of a chance to do anything about it." Chang deposition at 86-89. Plaintiff Valerio, a salesman of steel fabricated products, was able to find only one broker who was interested in attempting to sell his lot. Other brokers "didn't refuse outright, they just said, 'It's not worth our while to do it.'"

> Q. Did they explain to you?
> A. Explained to me there is no way I can sell that lot up there.
> Q. Did they say why?
> A. Well, because of all the class action -- adverse publicity. Because of the -- basically how -- that they were not sellable. They wouldn't even trade them.

Valerio Deposition at 105-06.

23/ In California Transport v. Trucking Unlimited, 404 U.S. 508 (1972), the Court applied the *Noerr-Pennington* doctrine to administrative and judicial proceedings. The Court also stated an exception to the general rule of immunity where the conspiracy was directed toward harassing "and deter[ing] their competitors from having 'free and unlimited access' to the agencies and courts." *Id*. at 515.

24/ The amended *McCubbrey* complaint specifically pled a violation of section 77q(a) which prohibits the use, in the offer or sale of securities, of the instrumentalities of interstate commerce

> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

The plaintiffs appear to allege violations of section 77q(a) as well as 77q(b), which states,

> (b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

25/ Paragraph 28 of the Valerio complaint is in essence a summary of paragraphs 25 and 26 of the McCubbrey complaint. It states,

> 28. Commencing in 1967 and continuing to the present, the Boise defendants have been engaged in the purchase and sale of real property and securities at Hidden Valley Lake Subdivision in Lake County, California, Pine Mountain Lake Subdivision in Tuolumne County, California, and

> at other places in and near Northern California, by fraud, deceit and other tortious and unlawful means. Said means include untrue statements, both oral and written, or material concealments, or both, concerning that property and securities and their value, resale and investment potential; their scarcity and the demand therefor; the recreational amenities, facilities and opportunities at and near them; the availability, installation and maintenance of roads, utilities and similar services at them; the development and construction and plans for same on, at or near them; the scenic attractions, physical characteristics, boundaries, easements, vegetation, terrain, suitability for building, subdividability, ownership, marketability, fungibility, taxes, assessments, interest on promissory notes, and complaint handling on, at and near them; the existence of nearby freeways or plans for same; the compliance with applicable state and federal laws regarding their sale; and others.

Apparently to avoid the *res judicata* effect of *McCubbrey*, the plaintiffs in *Valerio* do not base their claims for relief on these very serious misrepresentations. Rather, they argue and allege that these misrepresentations as to the value of the land, recreational facilities, the existence of freeways, etc., were merely among the means by which the Boise defendants concealed what is truly the material fact upon which the plaintiffs relied to their detriment; i.e., that the Boise defendants did not register the securities sold to the plaintiffs.

26/ The genesis of this lawsuit, as revealed by plaintiffs' depositions, raises some troublesome questions regarding the role of attorneys in the institution of litigation. Essentially, the plaintiffs went into their attorneys' offices to obtain relief in the small claims actions pending against them. They walked out with a 1.8 billion dollar lawsuit against 28 defendants alleging conspiracies between all of these defendants to do all of the acts alleged in the complaints' 37 counts. A layperson, of course, is not expected to be aware of the legal theories that are relevant to the facts he has presented his attorney. The plaintiffs here, however, have virtually no personal knowledge of the facts underlying many of their claims. Almost invariably their response to questions seeking the sources of their allegations, was, "My attorneys told me."

27/ Although there is some ambiguity in

plaintiffs' complaint, the "Boise defendants" appear to be:

Boise Cascade Corporation
Boise Cascade Home and Land
  Corporation
Boise Cascade Recreation Communities
  Corporation of Delaware
Boise Cascade Properties, Inc.
Boise Cascade Credit Corporation

APPENDIX A

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

J. BRUCE McCUBBREY, et al.,)
)
Plaintiffs,)
)
vs.) No. C-72-470-
) RFP
BOISE CASCADE HOME & LAND)
CORPORATION, et al.,)
)
Defendants.)
)

AFFIDAVIT OF EDWARD W. CLEARY, VICE PRESIDENT AND TREASURER OF BOISE CASCADE CORPORATION

EXHIBIT

STATE OF CALIFORNIA)
) ss.
CITY AND COUNTY OF SAN FRANCISCO)

I, EDWARD W. CLEARY, being first duly sworn, depose and say:

1. I am and since July 25, 1968, have been Vice President and Treasurer of Boise Cascade Corporation (Boise). My primary responsibility relates to the relations between Boise and its lenders. All references herein to Boise are to Boise Cascade Corporation, the parent corporation. Boise Cascade Home & Land Corporation (Home & Land) is a wholly-owned subsidiary of Boise and was created to own and operate substantially all of the real estate and real estate oriented properties and businesses of Boise. Home & Land has numerous subsidiaries, but for the purpose of this affidavit references to

Home & Land mean Home & Land and all of its subsidiaries, and financial figures given for Home & Land are on a consolidated basis. One principal wholly-owned subsidiary of Home & Land is Boise Cascade Credit Corporation (Credit Corporation) which was created to purchase from Home & Land notes and other receivables secured by real property. Home & Land directly and through its subsidiaries owns and operates or operated recreational communities, residential communities, mobile home communities, urban housing, mobile home manufacturing and commercial real estate developments. All references herein to "realty operations" include substantially all of the operations of Home & Land.

2. Boise's principal business is

lumber, paper and packaging, building materials and factory-built housing. Boise entered into the realty operations in the latter part of the 1960's by initially acquiring partnership interests in businesses in which Boise was the financial partner and the other partner the operator. By 1968 Boise had acquired these entire businesses from its partners and also acquired other land development companies.

3. The provisions of Boise's then existing long-term loan agreements were tailored to a manufacturing company and were not structured to apply to the realty operations. In 1967 Boise revised its long-term loan agreements to contain the concept of an "excluded subsidiary." Boise created Home & Land and transferred to

it most of its realty operations and realty subsidiaries. The renegotiated loan agreements limited Boise's investment (defined to include advances) in Home & Land to not more than $100 million and contained a limitation on the amount of obligations of Home & Land which Boise could guarantee.

4. As the result of the ever increasing cash demands of Home & Land, the following further financing was undertaken: (a) In 1969 Boise's investment in Home & Land was permitted to increase to $150 million provided the additional $50 million would be withdrawn by December 31, 1972, and the original restriction on an investment level of $100 million would be reinstituted; (b) Boise entered into a revolving credit arrangement

and utilized short-term line of credit with major banks throughout the United States, Canada and Europe to provide financing in addition to its long-term insurance company financing; (c) in April of 1971 Home & Land concluded a $200 million revolving credit loan with ten major banks in the United States and Canada to substitute for its then short-term bank borrowings; and (d) Boise effected two additional insurance company long-term loans totaling $75 million.

5. In the first half of 1971 Boise suffered its first serious financial setback and in June announced an extraordinary charge against consolidated earnings of $78 million before taxes ($48 million after taxes). $34 million of this extraordinary charge

was attributable to realty operations and most of the balance was attributable to the write-off of a construction joint venture in which Boise was a partner. For the year ended December 31, 1971, Boise and its consolidated subsidiaries reported a loss of $37 million, plus the foregoing after-tax extraordinary charge of $48 million, or a total loss of $85 million. The realty operations showed a net after tax loss of $46 million before the extraordinary charge attributable to them. At the end of 1971 Boise was barely able to comply with its loan covenants, and because of many adverse factors affecting realty operations substantial additional cash was required by Home & Land which could not be advanced from Boise under its loan agreement restrictions.

6. During the spring of 1972 Boise commenced negotiations with all lenders in an attempt to acquire additional cash and credit for Home & Land. The full impact of the State of California's suit and the various class action suits was by then being reflected in adverse sales results in the realty operations. Boise's projections indicated that by the end of the year it would be in default under many of the serious covenants of its loan agreements unless it obtained waivers or other modifications of the loan agreements by that time. It was clear that neither Boise nor Home & Land could borrow additional funds to fund their cash requirements. As a result, a divestiture program was undertaken to

generate cash.

7. By mid-year 1972, when realty sales fell substantially below projections, it was determined that consideration must be given to discontinuing and liquidating Home & Land's realty operations. This decision would result in an extraordinary charge to consolidated earnings of $210 million ($150 million net after tax).

8. The foregoing decision was taken only after conferences with all lenders inasmuch as the effect of such charge would have put Boise in default under its loan agreements. Trading in Boise's stock was suspended for slightly more than one day to enable Boise to confer with lenders prior to making a public announcement that consideration was being given to

this course of action. Prior to the time the decision was made Boise received temporary waivers of its loan agreement violations. During the course of negotiations with lenders a serious conflict arose between the insurance companies who took the position that the financial problems were those of Home & Land and the banks who took the position that these were over-all Boise problems. As a result of the extraordinary charge Home & Land had a deficit net worth.

9. Because of the serious financial position of Boise and Home & Land, discussions with lenders continued on almost a daily basis. The long-range objective of these discussions was to in some manner restructure the financing of Boise and of Home & Land

in order that both companies could continue to operate. An immediate objective was to cure the deficit net worth position of Home & Land, not only because it was required to file financial statements with the office of Interstate Land Sales, a part of the Federal Department of Housing and Urban Development which had threatened to suspend all remaining land sales activities, but also to permit Home & Land to continue maintenance and completion of projects as Boise had committed to do. Consent of the insurance companies was finally obtained to permit Boise to assume $125 million of Home & Land's $200 million revolving bank line of credit, the effect of which was to increase Boise's investment in Home & Land by

$125 million and cure its deficit net worth. Throughout the latter part of 1972, with the consent of the insurance companies, Boise also made net additional advances to Home & Land in the amount of $64 million.

10. Concurrently with the negotiations with the lenders, negotiations also commenced with the public and private attorneys in an attempt to settle the California litigation. Lenders continued to grant temporary waivers but clearly indicated it would be difficult to proceed with restructuring Boise's over-all loan agreements unless the liability with respect to the California litigation could be quantified and settled. Messrs. John Fery, President of Boise, Will Storey, Vice President and

Controller, and I, together with other Boise representatives, conducted meetings with public and private attorneys handling the California litigation against Home & Land to explain the serious financial difficulty of Home & Land and Boise. In the first of these meetings, involving extensive negotiations with the public attorneys, the extraordinary charge of $210 million was analyzed in detail, and certain reallocations were made in order to increase the negotiated settlement amount to the maximum dollar amount available within the charge. Lenders continued to monitor the progress of the California settlement negotiations.

11. The California settlement negotiations finally resulted in the execution of a Settlement Agreement in mid-February, 1973. Negotiations with

lenders culminated with amendments to Boise's insurance company loan agreements and a new Credit and Security Agreement between Home & Land and the lending banks, all of which were dated as of March 12, 1973. Until this date Boise continued to operate on temporary waivers which if not extended from time to time would have permitted its lenders to exercise their rights under the loan agreements.

12. The new Boise loan agreements as restructured contain restrictive covenants and, among other things, require (which has been accomplished) that the loans be secured and that Home & Land continue its course to liquidate the realty operations. By the time the restructuring was executed, Boise had accomplished its divestiture program,

which resulted in it making substantial debt payments (approximately $240 million and resulted in $44 million flowing directly into Home & Land to provide the necessary funds to comply with the California Settlement Agreement. As part of the restructuring the lenders have consented to the performance of the Settlement Agreement by Boise and by Home & Land.

/s/ EDWARD W. CLEARY
EDWARD W. CLEARY

Subscribed and sworn to before me
this 14 day of May, 1973.

/s/ Josephine Hulsman
NOTARY PUBLIC in and for the City
and County of San Francisco
State of California
[OFFICIAL SEAL]
JOSEPHINE HULSMAN
My Commission Expires Nov. 4, 1975

APPENDIX B

$58.5 MILLION

BOISE FINANCIAL PLIGHT LED TO SUIT SETTLEMENT

By Mitchell Thomas

Fears that the giant Boise Cascade Corp. might be going broke led the California attorney general's office to accept a half-a-loaf settlement of six big suits against the company.

"This is the best settlement we could have gotten without forcing them into bankruptcy, said Attorney General Evelle J. Younger, who announced the agreement Monday after it was approved by Boise Cascade's directors.

"We were potentially looking at a situation where we were going to be trying to get blood out of a turnip," a source in the attorney general's office said yesterday

That, the source said, was why the State agreed to a settlement totaling $58.5 million in six class action suits. In them, Boise Cascade was charged with using false and misleading practices to sell an estimated $360 million worth of recreational land in California.

VIEW

Boise Cascade, one of the wonders of the modern financial world, conceded that it was happy about the settlement, but denied vigorously that it was in any danger of folding up.

"We're hopeful that very shortly we can put most of our problems behind us," said Sam Donaldson, a spokesman at the firm's Palo Alto office.

Boise Cascade's problems - some of them, at least - have been no secret for some time. Its profits and stock prices have taken huge dips.

The company has been selling off some of its assets

negotiate many of our loan agreements ...

"But to say the bankers forced us to the settlement is absurd."

"The land business had been a very costly one for Boise Cascade," Donaldson said. "It did not make much sense to pour good money after bad."

He said that during the past year the company sold some major assets and set up a $200 million fund for the purpose of phasing out its recreational land business and liquidating some foreign investments.

Donaldson said some of the proceeds

from the property sales were used to reduce debts. The $200 million fund was listed as an extraordinary charge against income.

Since the company's actual net operating income for the first six months of this year was not quite $1 million, Boise Cascade reported a net loss of $196 million for the six-month period.

In October, however, the company reported that its net income for the third quarter of 1972 was $10.9 million, up from $2.4 million for the same period last year.

Also in October, R. V. Hansberger resigned as Boise Cascade's board chairman and chief executive. Hansberger had been credited with building the firm from a moderate-sized Idaho lumber company into an international conglomerate with sales of nearly $2 billion a year.

APPENDIX D

Filed Jul 15, 1981 RICHARD H. DEANE
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL VALERIO and YUNG HAO CHANG,

Plaintiffs-Appellants,

vs.

BOISE CASCADE CORPORATION, et al.,

Defendants-Appellees.

No. 79-4264

No. 79-4241

ORDER

Before: DUNIWAY and FERGUSON, Circuit Judges, and GRANT,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

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*The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

APPENDIX E

SECOND DRAFT

RECREATIONAL LAND CLASS ACTIONS

Outline of Proposed Settlement Procedure

This memorandum sets forth the views of Heller, Ehrman, White & McAuliffe concerning a proposed procedure for settling - in accordance with general terms already under discussion - the public action and private "class" actions now pending against Boise Cascade Recreation Communities Corporation and certain affiliated corporations, relating to sales of lots in recreational land developments of Boise Cascade Recreation Communities Corporation in California and at Incline

Village, Nevada.[*] This memorandum is transmitted solely as a part of and for purposes of settlement discussions and deliberations by and among counsel in these actions, and is not to be used for any other purpose, nor disclosed to any person other than such counsel.

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[*] As used herein, the word "Boise" shall be deemed to refer to Boise Cascade Recreation Communities, Inc., and, where appropriate, its predecessors in interest and any other subsidiaries of Boise Cascade, Inc. who have been or are parties to transactions with lot purchasers.

Basic Concept and Purpose of the Proposed Settlement

The basic purpose of the proposed settlement is to provide a fund and a procedure whereby cash payments and/or discharge of indebtedness may be granted to any and all purchasers who claim that they bought lots in Boise subdivisions in reliance on false or misleading representations or other sales practices, whose claims are allowed by the Attorney General, and who desire and elect to rescind their purchases. The total amount available for such payments and discharge of indebtedness is limited to the maximum amount which Boise is making available for the settlement. It is believed that this amount is more than sufficient to provide for full restitution of principal and interest paid and/or owed by purchasers whose claims are made and allowed, together with costs, private attorneys' fees and reimbursement of public agencies for expenses (hereinafter referred to as "expenses"). However, in the event the number of allowed claims is such that available funds would not provide for full restitution to each successful claimant, the plan provides alternatives assuring that each such claimant would receive substantial consideration in settlement of his claim. The plan would also require Boise to expend (in addition to the amounts distributed to purchasers) substantial additional amounts for completion of certain improvements at various projects (approximately $23 million), and for project management (approximately $19.5

million).

The claims procedure embodied in this plan is intended to assure that any person whose purchase was influenced by any false or misleading representations or other practices can easily obtain relief with a minimum of effort and expense. However, by requiring some evaluation of claims, the procedure also seeks to assure that persons who clearly are not entitled to relief will not share in the settlement fund and thereby reduce the amount available for those who are so entitled.

Unless allowed claims substantially exceed the fund (see pages 9-11, _infra_) the relief offered to purchasers under this settlement is limited to rescission. This is because, in the opinion of all parties and counsel, rescission is the type of relief which is desired by virtually all individuals who have asserted or are likely to assert claims.

The settlement, of course, allows any "class" member to request exclusion and thereby be free to pursue any other remedies. It also provides that if a very substantial number of purchasers (i.e., those whose claims for full restitution would exceed $) do request exclusion, Boise has an option to withdraw from the settlement. The reason for this is that Boise cannot undertake a settlement of this magnitude without receiving, as part of the settlement, a discharge of and protection against the potential claims of persons alleged to be members of the "class".

Definition of the "Class" Entitled to Participate In the Settlement

All persons who have purchased from Boise any lots in any of Boise's 19 California recreational subdivisions and Incline Village, and who now own such lots or who disposed of their lots through foreclosure, deed in lieu or [sic] foreclosure, or other conveyance to Boise or a third party for consideration less than they had paid to Boise and without executing a general release in favor of Boise.

The parties may wish to consider limiting this "class" to only those who purchased after a certain date. Such a limitation may be necessary at projects like Lake Arrowhead and Incline, where some people bought years ago from a predecessor developer, and possibly at other projects.

Basic Terms and Operation Of the Settlement

a. Apart from amounts to be expended for improvements and project management, Boise is making available for the settlement a total maximum sum of $31,975,000 in "asset drain". The term "asset drain" means cash paid by Boise plus discharge of balances owing on purchasers' notes. It should be noted, however, that the availability of this amount is predicated on the assumption that the relief for all successful claimants will be limited to rescission in which purchasers convey their lots to Boise. Assuming that the entire fund is distributed, this will enable Boise's net asset drain (total amount distributed minus wholesale value of lots reconveyed) not to exceed approximately $25.5 million.

b. From this sum of $31,975,000 will be paid and deducted all amounts to be paid to public agencies and private attorneys for costs, attorneys' fees and expenses.

c. The remainder of the settlement amount ($31,975,000 minus costs, fees and expenses) is hereinafter called the rescission fund. It will be distributed on the following basis: In general, relief will be awarded to any class member:

(1) to whom any oral or written statements were made before he bought his lot, which influenced the decision to purchase, and which were misleading or untrue; and

(2) who desires and elects to rescind the purchase of his lot by reconveying the lot in return for cancellation of the balance owing on his note and refund of cash paid to Boise;

(3) whose claim is filed and allowed under the procedures set forth below.

d. Claims Procedure

(1) Each class member will receive a claim form which will call for the following information:

(A) Name, present address and occupation at the time of purchase

(B) A description of his lot, date of purchase, the total price paid therefor, all cash paid thereon, and the amount now owing on his note or the terms and approximate date of any disposition of his lot if he no longer owns it

(C) A brief description of any statements which were made by Boise or its salesmen, either orally or in writing, prior to the purchase, which influenced the decision to purchase, and which the purchaser now believes were untrue or misleading. The purchaser would also be requested to attach any such writing if he still has it, and identify the salesman if he can recall his name.

(D) Whether any of these statements did influence the decision of purchase

(E) A statement of why the purchaser believes the statements to be untrue

(F) Whether he has previously made any complaint to Boise or any public agency concerning his lot or purchase transaction, and, if so, when and in what manner and to whom

(G) An authorization (special power of attorney) to the Attorney General to effect a conveyance of the purchaser's lot to Boise if he is granted rescission

(H) A declaration under penalty of perjury, and signature

(2) The processing, allowance or disallowance of claims. All claims will be submitted to and reviewed by the Attorney General or other public attorneys designated by him. In reviewing the claims, the Attorney General will follow the following standards and procedures:

(A) He will accept as true each claimant's sworn statement describing the representations made to him and stating that such representations influenced his purchase, unless such statements by the claimant are inherently incredible on their face, are directly contradicted by writings a claimant has signed or relies on or are found by the Attorney General to be knowingly false based on an investigation of the claim which includes interviewing the claimant.

(B) Assuming the claimant's statements describing representations and his reliance thereon are accepted as true, the Attorney General will allow the claim, unless the claim itself or other facts available to the

Attorney General, clearly establish that the representations described in the claim were not untrue or misleading, or were such generalized statements of opinion (e.g., "good investment", "beautiful lot", "nice view", etc.) as to afford no possible basis for legal relief.

NOTE: These standards greatly simplify the claimant's ability to secure relief so long as there is, prima facie, some basis for his claim. All presumptions are in favor of the claim, and the procedure virtually eliminates any issues as to fraudulent intent or negligence, reliance, the statute of limitations, or whether or not the claimed representations were actually made.

(C) In reviewing the claims, the Attorney General may inspect the property, may inspect any and all pertinent records of

Boise, may inspect public records, and, if necessary, may interview the purchaser and/or any present or former employees or agents of Boise.

(D) If the Attorney General disallows any claim, he shall so notify the claimant on or before a certain date, and shall specify, in writing, the reasons for disallowance.

(E) If a claim is disallowed, the claimant shall be entitled to an appeal to and hearing before a master or other arbitrator appointed by the Court and to be represented by counsel retained by him. The decision of such master or other arbitrator shall be final and non-appealable.

e. Relief Awarded

(1) If the total amount of cash paid to Boise and note balances (principal and past due interest) now owed to Boise by class members with allowed claims is less than or equal to the rescission fund ($31,975,000 minus the costs and fees and expenses) each such claimant, upon tender of a proper deed to Boise, shall

receive a refund of all cash paid by him to Boise (both principal and interest) and a cancellation of his note. Any surplus funds shall be returned to Boise.

(2) If the total amount of cash paid to Boise and note balances owed to Boise by successful claimants exceeds the rescission fund, then the relief for each claimant shall be one of the following:

(A) Rescission with prorated restitution award. The purchaser will convey his land to Boise and shall receive a restitution award which is calculated by determining the percentage which the rescission fund bears to the total amount that would be required to provide to all successful claimants full restitution (i.e., discharge of note balance plus refund of all cash paid to Boise), and then applying that percentage to the total of cash paid to Boise and note balance owed to Boise by the particular purchaser. This prorated restitution award will first be credited against the purchaser's note, and the remainder will be paid in cash. However, in the case of any person who no longer owns his lot, the restitution award will be calculated by applying the same percentage to the amount by which the total cash paid by the purchaser to Boise exceeds any consideration (other than cancellation or assumption of his note) received by the purchaser on disposition of his property.

(B) Monetary award without rescission. Under this method the purchaser will keep his land and receive a monetary award which will first be credited against his note balance (if any) in reverse chronological order of installments, and, if the award is greater than such balance (or if there is no outstanding note) the remainder payable in cash. This monetary award shall be calculated on the assumption that the maximum amount available for monetary awards (where purchasers do not reconvey their lots) is $25.5 million minus the costs, attorneys' fees and expenses. Each purchaser's monetary award will be the percentage of such maximum amount which is equal to the percentage his purchase price bears to the total purchase prices of all successful claimants. However, no purchaser who does not now own his lot will receive, under this method, an amount greater than the amount by which the total cash paid by the purchaser to Boise exceeds any consideration (other than cancellation or assumption of his note) received by the purchaser on disposition of his property.

The following rules will determine which of the above described types of relief will apply to each particular purchaser:

(i) If rescission with prorated restitution, as defined in subparagrah (A), will result in the claimant receiving discharge of his note balance (if any) plus refund of at least 75% of the total cash he has paid to Boise, then rescission with prorated restitution, as defined in subparagraph (A), shall be the sole remedy available to the claimant.

(ii) If rescission with prorated restitution as defined in subparagraph (A) would result in the claimant receiving discharge of his note balance plus refund of less than 75% but more than 10% of total cash paid by the claimant to Boise, then the claimant may elect to receive either rescission with prorated restitution, as defined in subparagraph (A), or a monetary award without rescission, calculated and paid as provided in subparagraph (B). Before making such election, the claimant will be advised by the Attorney General of the exact dollar amounts he would receive under each alternative method.

(iii) If rescission with prorated restitution, as defined in subparagraph (A), would result in the claimant receiving less than 10% of all cash paid to Boise, then such rescission would not be available to that claimant, and his relief shall be the monetary award calculated and paid as provided in subparagraph (B).

(3) It should be pointed out that the provision for monetary awards without rescission set forth in subparagraph (2) is designed to assure that even if the fund will not permit full or substantially

full restitution to successful claimants, they can still receive substantial consideration and not be limited to a disposition in which they lose their land but get little or nothing except discharge of their indebtedness.

Court Procedure

a. A complaint or amended complaint will be filed, preferably in the federal court. (It could be filed in the pending McCubbrey action.) Attorneys for plaintiffs will be all of the present class action attorneys, and possibly the Attorney General. Plaintiffs will be all of the present named plaintiffs, and possibly the

People.[*] The complaint will allege at least every misrepresentation now included within existing complaints. It may also allege other misrepresentations which any of the plaintiffs' attorneys can now say they have a basis for believing were made. The same is true with respect to alleged non-disclosures. It should also include a "breach of contract" theory based on the same alleged misrepresentations.

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[*] If the Attorney General does not join in the new consolidated complaint in Federal Court, he will independently file a new complaint or amended complaint in State court. The allegations of this complaint will relate to all subdivisions in California and will allege that the acts complained of occurred in all counties of California - so that the dismissal of the complaint will preclude other public attorneys from subsequently filing similar complaints.

Additional theories would be breach of fiduciary duty (see McCubbrey) and, of course, the federal statutory claims now asserted in McCubbrey.

b. The settlement agreement and a form of initial notice to class members would be presented to the Court for preliminary approval. Also, at this time the Court would enter an order declaring the new consolidated action to be conditionally a class action for purposes of the proposed settlement.

c. If preliminary approval were granted, the Court would direct the sending of a notice to all class members. This notice would advise class members of the claims asserted in the action, and of the basic terms of the proposed settlement. It would advise class members of the date and place of a hearing on final approval of the settlement and on any objections to that settlement.

d. At the next hearing, the Court would hear any objections to the proposed settlement, and, if satisfied that the settlement is fair and reasonable, would approve the settlement. The Court would also be asked to approve the form of the next notice (with claim form) to be sent to class members.

e. If the Court approves the settlement, such approval would be subject to an appeal, but unless a stay were obtained from the appellate court (or the parties thought delay advisable) the court and the parties could proceed with the settlement procedures pending the appeal.

f. Another notice would be sent to all class members advising them, with considerable specificity, of the nature of all claims asserted, the conditions under which they could secure relief, and the type of relief to be awarded (rescission only unless total awards exceed a certain amount). The notice would enclose a form for requesting exclusion, and would advise that unless that form is returned to the Court by a certain date, the class member would be included in this action and, whether or not he filed a claim, would be precluded from bringing any other action based on any of the claims asserted in the action. The notice would also enclose the claim form, would advise the claimant to fill it out and send it to the Attorney General by a certain date (presumably the same date as the deadline for requesting exclusion), and that otherwise he would not be allowed to seek any relief. We would suggest that the deadline for requesting exclusion and for filing claims be 60 days from the date of the mailing of this notice.

g. The settlement agreement would provide that if the total cash paid and note balances owed to Boise by the persons requesting exclusion exceeds $, Boise could, at its option, withdraw from the settlement agreement, in which case all issues, including the propriety of a class action, would become open for litigation, and the requests for exclusion would have no effect. Boise would have a specified reasonable period of time (we suggest 30 days) in which to make this determination. During this period of time it would have the right to examine the claims filed with the Attorney General.

h. After approval of the settlement and Boise's non-exercise of any option to withdraw, the other class actions would be dismissed, as would be all claims in People v. Boise seeking private monetary recovery. The constructive trust would be dissolved but presumably the preliminary injunction in People v. Boise would be made permanent.

APPENDIX F

AGREEMENT RESPECTING SETTLEMENT OF BOISE CASCADE CLASS ACTION AND PUBLIC AGENCY SUITS

This is an agreement between Boise Cascade Home and Land Corporation (Boise Home and Land), Boise Cascade Corporation (Boise Cascade), the State of California and its political subdivisions, and (excepting parties and claims excluded from this agreement and subject to approval of the Court), certain plaintiffs in the civil actions described below and an alleged class of persons whom such plaintiffs claim to represent in said actions.

A. Purposes of Agreement

A-1. The purpose of this agreement is to compromise and settle, subject to confirmation by an appropriate court or courts, certain public actions and the claims asserted on behalf of purported classes in actions now pending against Boise Cascade Corporation and certain of its subsidiaries (hereinafter collectively called "Boise defendants"). These actions are:

People of the State of California v. Boise Cascade Recreation Communities Corporation of Delaware, et al., Civ. No. 127902 (Contra Costa County, California Superior Court)

McCubbrey, et al. v. Boise Cascade, Inc., et al., United States District Court for the Northern District of California, Civil Action No. C-72-470 RFP

Head, et al. v. Boise Cascade, Inc., et al., United States District Court for the District of Nevada, Civil Action No. R-2636

Zinman, et al. v. Boise Cascade Corporation, et al., Civil No. 261305 (Santa Clara County California Superior Court)

Chiao, et al. v. Boise Cascade Recreation Communities of Delaware, et al., Civil No. 127903 (Contra Costa County Superior Court)

McCubbrey, et al. v. Boise Cascade, Inc., et al., Civil No. 167042 (San Mateo County, California Superior Court)

Carli, et al. v. Boise Cascade Recreation Communities of Delaware, et al., Civil No. 637445 (San Francisco County Superior Court)

A-2. In general, the claims asserted in these pending actions are that members of an alleged class or classes of persons have allegedly been induced by misrepresentations, unfulfilled promises, withholding of facts and unfair sales practices, to purchase land from certain of the Boise defendants located in various recreational developments in California and at Incline Village, Nevada (which developments are listed in Exhibit A hereto and hereinafter called "the projects") and that they should be afforded the right to rescind such purchases and receive restitutionary relief from the Boise defendants. The Boise defendants have denied all such allegations.

A-3. However, in settlement and compromise of the aforesaid claims, and in an effort to avoid lengthy disputes which may have a damaging effect upon said projects, the parties desire to execute this agreement.

A-4. A major purpose of the agreement is to effect a final restitution program for the benefit of all purchasers of property in the projects who have a claim against Boise Home and Land, Boise Cascade or any of its subsidiaries arising out of their purchase of property in the projects - excepting only those purchasers who desire to be excluded from the class in order to assert individual claims or litigation.

A-5. A further purpose of this agreement is to provide a means of assuring the completion, by Boise Home and Land, of the development, modifications and capital repairs of improvements and amenities at the projects, and Boise Home and Land's continued administration, supervision, and maintenance of said projects, thus accommodating the interests of those purchasers who desire to retain their recreational land in the projects.

A-6. In addition to the factors mentioned above, the parties recognize that if all persons alleged to be members of the classes in the pending litigation were to prosecute such litigation to a successful conclusion, the possibility of collecting money judgments either by such classes or individual members thereof is highly problematical. Further, the continuance of the litigation interferes with the ability of Boise Home and Land to fulfill contractual obligations and disrupts the orderly completion of the projects. Consequently, settlement of the pending class and public litigation appears to be in the best interests of the class.

In this connection, Boise Home and Land warrants that there are no existing insurance policies in effect providing insurance coverage for the claims asserted in the pending litigation.

B. Definitions

B-1. Boise Cascade Corporation and its subsidiaries are collectively termed "Boise". However, whenever in this agreement the term "Boise" is used in referring to sales practices, project operations or transactions with lot purchasers, that term refers only to the particular subsidiary or subsidiaries of Boise Cascade Corporation, or any of its or their predecessors in interest, which actually engaged in such sales practices or operations or were or are parties to the transactions referred to.

B-2. The State of California and all of its political subdivisions are collectively termed "the State".

B-3. Except to the extent excluded by the terms of Section C hereinbelow, all persons who at any time after January 1, 1960 purchased real property in any of the recreational land projects listed in Exhibit "A" (the "projects") from Boise, or from any prior developer or owner, or subsequent owner, at any such project, are collectively referred to herein as the "Class".

B-4. "The Court" means the Court or Courts to which the settlement provided for under this agreement is presented for approval and administration.

C. Persons and Claims Excluded from Agreement and Class

C-1. The following persons or claims are not included in the Class and this settlement shall not apply to or affect the specified claims of such persons.

C-2. Any claims arising from certain sales of a wholesale nature of property in the projects, which are identified in Exhibit B hereto, or from sales of the same property (or portions thereof) which took place subsequent to such transactions. The purchasers in such transactions shall not, with respect to those transactions, be included in the Class.

C-3. Any claims for injunctive or declaratory relief or for compensatory damages which are now asserted in the complaint in Lake Arrowhead Property Owners' Association v. Lake Arrowhead Development Co., Boise Cascade Corp., et al., San Bernardino County Superior Court No. 155721 based on the factual allegations in the complaint now on file in said action, which purports to be brought on behalf of a class of certain purchasers of property in Lake Arrowhead project. However, the settlement will apply to any and all claims for rescission, restitution or punitive damages, asserted by any persons alleged to be part of the plaintiff class in that action, whether or not based on the factual allegations of said complaint, and will also apply to claims by such persons for any kind of relief which are not based on the factual allegations of that complaint and are otherwise covered by this settlement. In addition, any such persons who file claims under this settlement and whose claims are allowed shall also be barred by this settlement from asserting any compensatory damage claims which are otherwise covered by this settlement.

C-4. Any member of the Class who makes a timely request for exclusion from the Class in the manner hereinafter provided.

D. Discharge of Claims and Approval of Court

D-1. Subject to approval of the Court and excepting parties and claims excluded from this agreement, this settlement shall operate as a complete release and discharge of all claims of every kind whatsoever (including without limitation claims for rescission, restitution, compensatory damages, specific performance, punitive damages, penalties, injunctive or declaratory relief) which the State, the Class or any member of the Class asserts or could assert against Boise Cascade Corporation, any or all of its past or present directors, officers, employees, agents, representatives and shareholders (both in their representative and in their individual capacities), their respective past or present successors and assigns (including any title insurance companies or financial institutions which have conveyed any lots in the projects or received any payments from purchasers of such lots, as agents, nominees or trustees for Boise), and all property owners' associations related to any of the projects and their respective directors, officers and employees (both in their representative and in their individual capacities), and which claims are based on or arise from the facts alleged in any of the complaints in the above-referenced actions, and/or the facts alleged in the amended complaints hereinafter provided for in this agreement.

D-2. Court Approval. This settlement agreement is subject to approval by a court of competent jurisdiction. It is intended that this agreement will be presented to such court with the recommendation by the parties that it is fair, just and equitable and should be approved, and that the terms hereof should be finally approved and ordered performed by a Settlement Order, and that said Settlement Order shall be a judgment within the meaning and for purposes of Rules 23 and 54(a) of the Federal Rules of Civil Procedure and Rule 4(a) of the Federal Rules of Appellate Procedure.

E. Financial Provisions

E-1. Project Completion. Boise Home and Land agrees to pay or cause to be paid the amount necessary to construct and maintain improvements and amenities in the projects as specified in the California Real Estate Commissioner's latest Public Report issued to Boise on each project. Boise Home and Land agrees to complete all of the improvements and amenities (including certain improvements and amenities in addition to those specified in said Public Reports) which are listed in Exhibit C hereto. Completion of such improvements had an estimated cost of approximately $18.5 million as of June 30, 1972 and had an estimated cost of approximately $14 million as of November 1, 1972. Certain of said improvements are subject to performance bonds as specified in Exhibit C. Boise Cascade Corporation guarantees the performance of Boise Home and Land respecting completion of those improvements for which performance bonds have not been executed. Such unbonded improvements are more fully described in Exhibit C hereto. The amount of such guarantee by

Boise Cascade Corporation shall be $6.5 million (representing the estimated cost of the unbonded portion of the project construction costs) and the amount of such guarantee shall be reduced pro tanto as such unbonded construction costs are expended.

E-2. Project Administration. With respect to each project, Boise Home and Land agrees to provide or cause to be provided administration and maintenance to the degree required by the California Real Estate Commissioner's latest Public Report issued to Boise and other written agreements made by Boise with lot purchasers, project associations or public entities. As of June 30, 1972 the estimated cost of such administration and maintenance was approximately $21.5 million and as of November 1, 1972 the estimated cost of such administration and maintenance was $17.4 million. Boise Cascade Corporation guarantees the performance of Boise Home and Land with respect to project administration, supervision and maintenance as described in this paragraph. The amount of such guarantee by Boise Cascade Corporation shall be $17.4 million, and shall be reduced pro tanto as such costs are expended.

E-3. Restitution Trust Fund. Boise Home and Land agrees to establish a restitution trust fund of $30 million to provide funds for performance of its obligations under Section G. Boise Home and Land agrees that, upon the Court ordering conditional certification and directing the sending of the notices described in paragraph F-1, it will deposit the $30 million in cash in trust at a bank or banks to be designated by Boise Home and Land. Boise Home and Land shall have the right to direct the investment of such trust fund in interest or non-interest bearing certificates of deposit or time deposits or securities of any state or national bank with assets exceeding $100 million, or in government securities, provided that the principal of said fund shall remain intact under the trust and shall be available for distribution if, as and when required under this agreement. Any interest earned from the said $30 million, in said trust, shall be the property of Boise Home and Land. If this settlement is not finally approved by the Court after presentation to the Court, or if an option to terminate this settlement is exercised pursuant to Section H hereof, said trust will terminate, and all of its assets shall be returned to Boise Home and Land. If the settlement is finally approved, any assets remaining in the trust after full payment of all amounts required to be paid on allowed claims under Sections G and paragraphs E-4-a and E-4-b of this agreement shall be returned to Boise Home and Land. Except insofar as moneys in the trust are to be returned to Boise Home and Land or may be invested at the direction of Boise Home and Land (as authorized by this paragraph), no funds shall be withdrawn from said trust except on order of the Court.

E-4-a. Payment to State. In discharge of all claims against Boise by the State for reimbursement of expenses and costs of suit, Boise Home and Land agrees to pay to the State the sum of five hundred thousand dollars ($500,000.00).

E-4-b. Private Class Action Attorneys' Fees. Subject to approval by the Court, which Boise Cascade and Boise Home and Land will recommend, Boise Home and Land agrees to pay attorneys' fees in the sum of $2 million to the private attorneys in respect to their representation of the Class in the actions referred to in paragraph A-1, provided, however, that certain expenses incurred by the settlement committee as hereinafter provided will, if this agreement becomes final, be charged against said private class action attorneys' fees. Counsel for Boise Cascade, Boise Home and Land, and counsel for the State represent that they are familiar with the quality and extent of the services performed and the time expended by said private attorneys on the private class actions affected by this settlement, and the responsibility assumed by said attorneys, and with all other matters relevant to the reasonableness of said fees, and that in their opinion the recommended attorneys' fees are fair, just and reasonable.

E-4-c. To provide for the payments required by paragraphs E-4-a and E-4-b, Boise Home and Land agrees to deposit an additional $2.5 million in cash in the trust described in paragraph E-3, upon the Court ordering conditional certification and directing the sending of notice.

E-4-d. The payments required by paragraphs E-4-a and E-4-b, adjusted pursuant to paragraph I-2, shall be made as soon as the Court has entered the Settlement Order as provided in paragraph D-2 and the time for appeal from such order has expired or said order has been affirmed on appeal, and all class action claims in the other actions described in paragraph A-1 and all claims for monetary relief in People of the State of California v. Boise Cascade Recreation Communities of Delaware, et al., Civil No. 127902, Contra Costa County Superior Court, have been dismissed with prejudice in accordance with the provisions of paragraph J-5. There shall be added to such payments interest on the net amount of such payments (after the adjustments pursuant to paragraph I-2) which shall accrue from the later of (i) the computation date as defined in paragraph G-1-d, or (ii) the date of entry by the Court of the Settlement Order as provided in paragraph D-2 (such interest to accrue as aforesaid notwithstanding any appeal from said Order). The rate or rates of such interest shall be identical to the rate or rates of interest being paid by Bank of America on 90-day commercial certificates of deposit during the period such interest is accruing. After the payments required by paragraphs E-4-a and E-4-b have been made as provided in this paragraph, all further settlement committee expenses (paragraph I-2) shall be borne exclusively by the private class action attorneys.

E-5. Enforcement. Notwithstanding anything to the contrary contained in this agreement, the obligations of Boise Home and Land and Boise Cascade Corporation under paragraphs E-1 and E-2 hereof may be enforced by the Court only upon application of the Attorney General of the State of California.

F. Notice and Claims Procedure

F-1. Upon the filing of amended complaints and presentation of this agreement to the Court as hereinafter provided, a written notice substantially in the form of Exhibit D hereto, or as otherwise approved by the Court, shall be directed to all persons who at any time after January 1, 1960 purchased real property in any of the recreational land projects listed in Exhibit "A" (the "projects") from Boise, or from any prior developer or owner, or subsequent owner, at any such project (except those persons excluded from the Class by paragraph C-2 of this agreement). The notice shall be directed in the method prescribed by the Court, which method shall include mailing to the extent practicable. Said notice shall fairly advise Class members of conditional class certification by the Court, of the terms of this agreement, of a date to be set for the hearing of objections to this agreement, and of the options, elections and relief offered to the Class, as set forth below. There shall be enclosed with said notice a statement in one or more of the forms attached hereto as Exhibits E-1 through E-21 which describe the project(s) in which the member of the Class owns a lot.

F-2. Exclusion from Class. Persons who would otherwise be Class members, but who desire to be excluded from the Class, shall request such exclusion by filing with the Court a written request for exclusion within 90 days of the mailing of the notice of conditional class certification and proposed settlement. All persons filing such a request within the prescribed time shall be excluded from the Class, shall not be bound by this agreement or by the final judgment of the Court approving this agreement, and shall not participate in the restitution fund.

F-2-a. Co-owners and Spouses. All present owners or co-owners of a lot will be excluded from the class and from this action and settlement if a request for exclusion is filed by any present owner or co-owner of the lot or by any person who is or was married to a present owner or co-owner at any time such owner or co-owner owned an interest in the lot. Such a request will also exclude anyone who previously owned the lot jointly or in common with a present owner or co-owner. In addition, any former owner or co-owner will be excluded if a request for exclusion is filed (i) by any person who was married to such former owner or co-owner at any time such former owner or co-owner owned an interest in the lot, or (ii) any person who owned the lot jointly or in common with such former owner or co-owner.

F-3. Effect of Not Filing Claim or Requesting Exclusion. Class members who do not file a claim as provided in paragraph F-4 or a request for exclusion as provided in paragraph F-2 shall retain their property in the projects (receiving such advantages as may result from Boise Home and Land's commitments to project completion and future administration), shall be bound by the settlement and the final judgment or decree of the Court, and shall not participate in the restitution fund.

F-4. Claims for Restitution. Each member of the Class who believes that he has a claim against Boise Cascade

Corporation or any of its subsidiaries, arising out of his purchase of property in any of the projects from Boise or from any prior owner or developer or subsequent owner at the projects, and who desires to restore such property to Boise Home and Land, or has previously disposed of such property, may request restitution from the restitution fund by filing (i) a claim for restitution in a form substantially similar to Exhibit F hereto (or such other form as may be approved by the Court) and (ii) if the claimant owns the property which is the subject of his claim, a duly executed and acknowledged deed to the claimant's property in the form attached as Exhibit G hereto. If at the time of filing the claim two or more persons hold title to a lot the deed shall be executed and acknowledged by all such co-owners. The claim form will authorize the Attorney General to fill in the deed with the legal description of the claimant's property and to record said deed if the claim is allowed and the claimant's lot is to be reconveyed as determined under Section G of this agreement. All claims must be signed under penalty or (sic) perjury. Claims must be filed within 90 days of the mailing of the notice of conditional class certification and proposed settlement.

F-5. Filing with and Review by Attorney General. All claims for restitution shall be filed with the Attorney General of the State of California or his designee (Attorney General). The Attorney General shall note on each claim the date on which it is received by the Attorney General. Claims will be reviewed by the Attorney General in consultation with the settlement committee provided for in paragraph F-6 below, and in accordance with the standards and procedures provided below. Claims shall be reviewed and allowed or disallowed as promptly as possible following the expiration of the period for filing claims.

F-6. Settlement Committee. There shall be a settlement committee composed of four persons, two designated by the Attorney General and two by the attorneys representing the Class in private actions. In addition to consulting with the Attorney General concerning his review of claims, the settlement committee shall, to the extent requested by the Attorney General, assist the Attorney General in investigating claims and administering the distribution of the restitution fund.

F-7. Standards of Review. In reviewing claims, the Attorney General shall accept as true each claimant's sworn statements contained in the claim, unless such statements are inherently incredible on their face or are determined by the Attorney General to be false based on an investigation. If, under this standard, a claimant's statements are accepted as true, his claim shall be allowed if the Attorney General determines that the statements contained in the claim show that the claimant purchased his property as a result of any of the statements or practices described in paragraphs 25, 26, 27, 28, 30, 31, 32 or 33 of the Amended Complaint attached hereto as Exhibit H, excepting any such statements or practices which the Attorney General finds were not untrue or misleading. The Attorney General shall have broad discretion in the application of the foregoing standard to particular claims. His decision allowing a claim shall be final.

F-8. Investigation of Claims. In reviewing claims, the Attorney General may inspect the property, any pertinent records of Boise, and public records. He may interview the claimant and/or any present or former employees or agents of Boise.

F-9. Resale, Rescission. A claimant who has previously disposed of his lot, whether by resale to a third party or by reconveyance to Boise, will not be entitled to participate in the Restitution Fund, and his claim will be disallowed, if such claimant received for such resale or reconveyance consideration of any kind (other than assumption or cancellation of his "note balance" as defined in paragraph G-1-b) which was equal in value to at least 60% of the amount of cash, including principal and interest, paid by him in respect to the purchase of such lot. Any claimant who, with the advice of independent counsel, has executed a general release in favor of Boise shall not participate in the Restitution Fund regardless of the consideration received by such claimant in connection with such release.

F-10. Previously Settled Claims of Woodland Hills Owners. The Attorney General shall disallow any claims which are asserted by any persons who owned lots in the Woodland Hills (Bell Canyon) project on June 14, 1971 and which are based on any of the factual allegations contained in the *First Amended Complaint in Woodland Hills Country Estates Association and Its Members v. Bank of California, etc., Spruce Land Corporation, et al.*, Ventura County Superior Court No. 51990, or which are described in section B, paragraph 1, of

Exhibit 1 to the "Notice of Proposed Settlement and Compromise of Class Action", dated June 14, 1971, and directed to the Class members in said action No. 51990.

F-11. Appeal. Any Class member whose claim is disallowed by the Attorney General shall promptly be given written notice of such disallowance and of the reasons for such disallowance and shall have the right to appeal such disallowance to the Court, by filing with the Court a written notice of appeal within 20 days after the mailing to the claimant of the notice of disallowance. The Court may appoint an independent Arbitrator to hear and determine such appeals. The claimant may, if he chooses, retain private counsel to represent him in connection with such appeal. The appeal shall be conducted as a de novo proceeding, but the decision on such appeal shall be final and binding upon all parties thereto, and no further appeals or other judicial review will be allowed.

F-12. Information Regarding Claims. During the period in which claims are being filed, or at any time thereafter, the Attorney General shall allow a representative of Boise Home and Land and/or its attorneys to inspect and copy any or all claims which have been filed. During the period that claims are being reviewed and allowed or disallowed by the Attorney General and by the Court or Arbitrator on any appeals from disallowance, the Attorney General or the settlement committee shall use their best efforts to furnish to Boise Home and Land or its attorneys, on a daily basis, current and up-to-date lists of all claims allowed by the Attorney General (which lists shall show the claimant's name and address and identification of the subject lot or lots) together with the deed or deeds, if any, executed by such claimants in connection with such claims. Such information is to be furnished solely for the purpose of expediting the processing and computation of claims and prompt distribution on allowed claims. Boise Home and Land and its attorneys shall keep all such information in confidence and will not disclose it to any other person. The deeds forwarded to Boise Home and Land pursuant to this paragraph shall not be recorded or used for any purpose (except completion of property descriptions therein) unless and until such recording is authorized pursuant to Section G hereinbelow.

Promptly after all claims have been either allowed or disallowed, the Attorney General or the settlement committee will furnish to the attorneys for Boise Home and Land, the Class and the State a final list of all claims allowed or disallowed.

Except as provided in this paragraph F-12 and in paragraph H-1-a, all claim forms and other communications received from the Class shall be held by the Attorney General and the contents thereof shall not be communicated to any party nor to the counsel for any party until the time for electing exclusion from the Class has elapsed.

G. Distribution of Fund

G-1. Definitions. For purposes of this Section G the terms hereof shall have the meanings set forth below.

G-1-a. Claimant, Claim Filing Date, Owner, Non-Owner, Property. "Claimant" means a claimant whose claim has been allowed by the Attorney General or by the Court upon appeal from disallowance by the Attorney General. "Claim" means a claim so allowed. "Claim filing date" means the date a claim is received by the Attorney General. "Owner" means a claimant who, on the date he files his claim, owns the property which is the subject of his claim, and "non-owner" means a claimant who, on the date he files his claim, does not own the property which is the subject of his claim. "Property" means the property purchased by the claimant which is the subject of his claim.

G-1-b. Purchase money note, note balance. A claimant's "purchase money note" means any outstanding promissory note or installment sales contract given or assumed by the claimant as part of the purchase price of the property and shall include, for property purchased at the Incline Village project, any Incline Village General Improvement Assessment Bond which is a lien on the claimant's property. A claimant's "note balance" means the total amount owed on the claimant's purchase money note as of the computation date, including principal and accrued interest.

G-1-c. Cash payments. A claimant's "cash payments" means all cash paid by the claimant on the purchase price of the property, including down payment and payments of principal, interest and late charges under the claimant's purchase money note. All other payments made in connection with the property, including without limitation payments of property taxes, assessments (except Incline Village General Improvement Assessment Bonds), and expenditures for improvement or maintenance of the property, are not included in the term "cash payments". In the case of a non-owner, "cash payments" means the cash payments hereinabove defined minus the value of any consideration (other than the discharge or assumption of his note balance) received by him on disposition of the property.

G-1-d. Computation date. "Computation date" means the first day of the first calendar month which commences after Boise Home and Land has received from the Attorney General or the settlement committee a certified list showing the names and addresses of all claimants whose claims have been allowed (including claims allowed on appeal under paragraph F-11) and identifying the property covered by each such allowed claim.

G-1-e. Delinquent, interim taxes. "Delinquent taxes" means all real estate taxes assessed against an owner's property which became delinquent before March 1, 1973, and which are delinquent on the computation date, and any interest and penalties thereon as of the computation date. "Interim taxes" means the installment of California 1972-73 real estate taxes assessed against an owner's property which becomes due on April 10, 1973, or, at Incline Village, any installment of Nevada 1971-72 real estate taxes assessed against an owner's property which becomes due on March 5, 1973. In recognition of the fact that absent unusual circumstances, owners who made no payments on their purchase money notes after January 31, 1972 would normally have lost their lots through foreclosure and thereupon would have been released from all property tax obligations, "interim taxes" shall also include all delinquent taxes of any owner who has made no payment on his purchase money note after January 31, 1972.

G-1-f. Gross claim. A claimant's "gross claim" means the total of the claimant's note balance, cash payments, and interim taxes as of the computation date.

G-2. Restitution Fund. The restitution fund shall be $24 million, plus (a) 24% of the aggregate original retail purchase prices of the property owned by all owners, plus (b) 12% of the amount, if any, by which $22,500,000 is exceeded by the aggregate of all claimants' note balances as of the computation date.

G-3. Full Restitution with Lot Reconveyance. If the restitution fund is equal to or more than the aggregate of all gross claims, each owner's property shall be conveyed to Boise Home and Land, and each claimant shall receive full restitution consisting of:

(1) cancellation of the claimant's entire outstanding note balance,

(2) payment or assumption by Boise Home and Land of the full amount of the claimant's interim taxes, and

(3) a cash refund equal to the full amount of the claimant's cash payments. This refund will be reduced by the amount of the claimant's delinquent taxes, except that no such deduction will be made for any owner who has made no payment on his purchase money note after January 31, 1972.

Any balance remaining in the restitution fund after making such full restitution shall be returned to Boise Home and Land.

G-4. Partial Restitution with Lot Reconveyance. If the restitution fund is not sufficient to make full restitution on all claims as provided in paragraph G-3, but said fund is nevertheless equal to or greater than the total of (a) all owners' note balances as of the computation date, (b) all interim taxes, (c) all cash payments made by claimants between their claim filing dates and the computation date, and (d) at least 60% of all claimants' cash payments up to their claim filing dates, then each owner's property shall be conveyed to Boise Home and Land, and claimants shall receive partial restitution as provided below.

G-4-a. Cancellation of Notes. The outstanding note balances of all owners as of the computation date shall be cancelled and the amount so cancelled shall be charged against the restitution fund.

G-4-b. Payment of taxes, post-claim cash payments. Boise Home and Land shall pay or assume the full amount of all interim taxes and shall refund all cash payments made by any claimant after his claim filing date; and there shall be charged against the restitution fund all such interim taxes, and the amount of all cash payments made by claimants between their claim filing dates and the computation date.

G-4-c. Pro-rata refund of cash payments. The balance remaining in the restitution fund after the charges in paragraphs G-4-a and G-4-b shall be divided by the aggregate cash payments of all claimants up to their claim filing dates. The resulting percentage shall be applied to each claimant's cash payments up to his claim filing date and the resulting amount shall be refunded to each claimant in cash. This refund shall be reduced by the amount of the claimant's delinquent taxes, except that no such deduction will be made for any owner who has made no payment on his purchase money note after January 31, 1972.

G-5. Partial Restitution with Lot Retention. If the restitution fund provided above is not sufficient to provide for the refund of at least 60% of all claimants' cash payments up to their claim filing dates, together with all other charges specified in paragraphs G-4-a and G-4-b, all owners will retain their lots (and the deeds submitted with their claims shall be promptly returned) and claimants shall receive partial restitution as provided below.

G-5-a. Adjusted Fund. The adjusted restitution fund shall be $24 million.

G-5-b. Percentage. The adjusted fund of $24 million shall be divided by the aggregate note balances and cash payments of all claimants, as of the computation date, to determine the percentage which the adjusted fund bears to said note balances and cash payments.

G-5-c. Non-owners. Each non-owner shall receive a cash award calculated by multiplying his cash payments by the percentage determined under paragraph G-5-b.

G-5-d. Owners. Each owner shall receive a cash award calculated by multiplying his cash payments as of the computation date by the percentage determined under paragraph G-5-b. A like percentage of each owner's note balance shall be cancelled. Payments on the reduced note shall be recomputed as of the computation date to amortize the balance owing thereunder over the period of the note at the interest rates and upon the other terms and time periods provided in the note. Payments made by an owner on his installment note after the computation date shall be applied to the reduced note.

For owners at Incline Village, the total reduction in note balance shall be applied first against the promissory note given to Boise in connection with the purchase of the lot. If said reduction is greater than the total balance owing under said promissory note, the excess shall be applied as a partial prepayment of the next ensuing installment or installments of the Incline Village General Improvement Assessment Bond which is a lien against the lot, but without affecting the amounts of other installments payable under the present terms of said Bond.

G-6. Procedure for Fund Distribution and Lot Reconveyance.

G-6-a. Information from Boise. Within 15 days after the computation date, Boise Home and Land will inform the settlement committee of the following information, as shown by its records: (a) the amount of each claimant's note balance as of the computation date; (b) each claimant's cash payments as of his claim filing date and as of the computation date; (c) each claimant's cash payments after his claim filing date; and (d) identification of each owner who has made no payment on his purchase money note after January 31, 1972.

G-6-b. Determination of Awards. Upon receipt of the foregoing information the Attorney General will first promptly determine the amounts of all cash payments and note balances which must be ascertained to determine the nature and amount of relief to be awarded to claimants under this Section G. The Attorney General shall resolve any conflicts between the amounts stated in the claim and the amounts reported by Boise Home and Land, and his decision respecting such conflicts shall be final. If the determination of note balances and cash payments makes it necessary to determine interim taxes and delinquent taxes, the Attorney General, the Settlement Committee and Boise Home and Land shall cooperate to ascertain as quickly as possible, and the Attorney General shall then determine, the amounts of all owners' interim taxes and delinquent taxes. After making all of these determinations, the Attorney General shall then determine the nature and amount of relief to be awarded to each claimant in accordance with this Section G. The Attorney General will immediately notify Boise Home and Land of said determinations and the calculations on which they are based.

G-6-c. Time for reconveyance and payment. The fund shall be distributed at such time as:

(1) the Court has entered

the Settlement Order as provided in paragraph D-2 and the time for appeal from such order has expired or said order has been affirmed on appeal;

(2) all class action claims in the other private actions referred to in paragraph A-1 and all claims for monetary relief in People v. Boise Cascade Recreation Communities of Delaware, et al., Civil No. 127902, Contra Costa County Superior Court, have been dismissed with prejudice as provided in paragraph J-5;

(3) the Attorney General has notified Boise Home and Land of his determination of awards as provided in paragraph G-6-b; and

(4) if the restitution requires the reconveyance of lots, the time for notice of adverse claims or liens, provided below, has expired.

G-6-d. Cash payments and note cancellation. At the time for distribution, Boise Home and Land shall pay from the restitution trust fund (1) to each claimant, the cash to which he is entitled, plus interest as provided below, and (2) to the holder of each claimant's purchase money note, the amount necessary to cancel or reduce such note to the extent required hereunder. In the event lot reconveyance is required hereunder, any claimant whose property is subject to adverse claims or liens shall be subject to the further conditions of paragraph G-6-e-2 below.

G-6-d-1. Payments to Co-owners, Spouses. Any cash to be distributed on a claim by a present owner or co-owner of a lot shall be paid jointly to, or as otherwise consented to in writing by (1) all owners or co-owners, and (2) each person who is or was a spouse of a present owner or co-owner at any time when such owner or co-owner owned an interest in the property, excepting any spouse who has conveyed title to the lot by a recorded deed. If any person who was or claims to be a former co-owner of a lot has filed a timely request for exclusion from the class, or has filed a timely claim to the restitution fund, or has given written notice to the Attorney General, prior to the date for distribution, of a claim to all or part of the payments to be made in respect to such lot, the Attorney General may make such adjustments or allocations of the payments to be made in respect to such lot as he deems necessary or appropriate to provide for any such conflicting or potentially conflicting claim, and his decisions in this regard shall be final.

G-6-d-2. Interest. The cash to which each claimant is entitled shall accrue interest from the later of the computation date or the date of entry by the Court of the Settlement Order under paragraph D-2, (regardless of any appeal therefrom) and said interest shall cease to accrue on the first day of the month in which the claimant is mailed either the cash to which he is entitled or a notice of adverse claims or liens under paragraph G-6-e-1, below, provided that if a claimant becomes entitled to a refund of payments made subsequent to the date that interest begins to accrue as specified above, interest on such refunds shall accrue from the respective dates on which such subsequent payments were made. The rate or rates of such interest shall be identical to the rate or rates of interest being paid by Bank of America on 90-day commercial certificates of deposit during the period the interest provided for herein is accruing.

G-6-e. Lot Reconveyance. If lots are required to be reconveyed to

Boise Home and Land then, as soon as the conditions prescribed in subparagraphs (1), (2) and (3) of paragraph G-6-c have been fulfilled, Boise Home and Land shall be authorized to record all deeds submitted by owners in connection with their claims.

G-6-e-1. Notice of adverse claims and liens. Within 15 days after the date on which Boise Home and Land is authorized to record such deeds, Boise Home and Land shall notify the settlement committee in writing of the nature and amount of any adverse claims or liens which are then of record against any owner's property. "Adverse claims or liens" means recorded ownership claims or interests of persons other than the person or persons who executed the deed submitted with the claim, the lack of proper execution and acknowledgement of a deed by a co-owner or spouse as required by paragraph G-6-e-3 below, and any recorded liens against the property other than liens for interim taxes and delinquent taxes, for assessments which were not delinquent as of the computation date, and for the owner's purchase money note or notes. Unless notice thereof is given by Boise Home and Land as required herein, it shall be deemed that no such adverse claims or liens exist.

G-6-e-2. Clearing adverse claims and liens. An owner shall receive no restitutionary award until title to his property has been cleared of adverse claims or liens. Each owner whose property is subject to adverse claims or liens shall be promptly notified by the settlement committee of the nature and amount thereof, of the amount of restitution to which such owner is entitled, and that such restitution will not be made until title to the property has been cleared of such adverse claims or liens. The settlement committee may, in consultation with Boise Home and Land, authorize Boise Home and Land to reduce the cash payable to any such owner by the amount of any such lien.

G-6-e-3. Reconveyance by co-owners, spouses. The deed conveying any lot owned by co-owners shall be executed and acknowledged by each co-owner. The deed conveying any lot shall also be executed and acknowledged by each person who is or was the spouse of an owner or co-owner at any time when such owner or co-owner owned an interest in the property, unless said spouse has previously conveyed title to the lot by a recorded deed.

H. Option to Terminate

H-1. Boise Home and Land and Boise Cascade shall have the right, at their sole option, to terminate and withdraw from this agreement in the event that $3.2 million is exceeded by the total of (i) 125% of the aggregate original retail sales prices of lots in the projects owned by Class members electing exclusion plus (ii) 125% of the "cash payments" (as defined in paragraph G-1-c) of Class members who are not lot owners and who request exclusion; provided, however, that the $3.2 million shall be increased by the amount, if any, by which $30 million exceeds the aggregate note balances (as defined in paragraph G-1-b) and cash payments (as defined in paragraph G-1-c) of all claims as of the date filed. Attached hereto as Exhibit I is a schedule of certain pending claims against Boise respecting the sale of land in the projects. Requests for exclusion respecting the claims listed on said Exhibit I shall not be counted toward said $3.2 million.

H-1-a. Exercise of Option. The option provided in paragraph H-1 shall be exercised by written notice from Boise Home and Land to the Court and to the settlement committee not later than 20 days after the end of the period for filing claims under paragraph F-4.

The Attorney General will furnish to Boise Home and Land not less frequently than once a week, copies of all requests for exclusion from the Class which are received by him. Boise Home and Land shall keep such information in confidence and will not disclose it to any other person.

The right to terminate and withdraw shall expire in the absence of timely written notice as aforesaid. In the event that Boise Home and Land and Boise Cascade shall become entitled to and shall timely exercise said option to terminate, all actions affected by this agreement shall thereafter proceed as if this agreement had not been made, the claims and rights of all parties as to all issues (including the propriety of class actions) will be fully preserved, and the requests for exclusion shall have no further force or effect.

I. Expenses of Settlement Administration

I-1. Class Lists, Mailing. Boise Home and Land shall pay as and when incurred, all costs and expenses of compiling class lists and printing, mailing and publishing notices and communications to the class which are required by paragraphs F-1, G-5, G-6-d, G-6-e-2, and H-1-a of this agreement or by order of the Court, not including, however, communications to or with class members in response to their requests for information or in the investigation, review and determination of their claims. Such payments shall under no circumstances be refunded to Boise Home and Land.

I-2. Settlement Committee Expenses. It is contemplated that the Attorney General and the settlement committee will incur expenses and costs in connection with the handling and reviewing of claims hereunder, including but not limited to, office rental, clerical and secretarial expenses and investigative expenses, but not including attorneys' fees. Boise Home and Land shall advance and pay such expenses as and when incurred. In the event that this settlement does not become final for any reason, funds so advanced will not be refunded to Boise Home and Land. In the event that this settlement becomes final and is fully performed by Boise Home and Land, all sums so advanced in excess of $22,500 shall be charged against the private class action attorneys' fees to be paid by Boise Home and Land, and said fees shall be reduced by the amount of said settlement committee expenses in excess of $22,500.

J. Court Proceedings

J-1. McCubbrey Action. For purposes of this settlement it is agreed that McCubbrey, et al. v. Boise Cascade, Inc., et al., United States District Court for the Northern District of California, Civil Action No. C-72-470

RFP is the appropriate action in which to request court approval and administration of this settlement. The parties shall stipulate in said action that the following shall occur: (a) that an amended complaint may be filed, in substantially the form of Exhibit H hereto; (b) that all counsel of record in all of the purported class actions referred to in paragraph A-1 shall become counsel of record in the McCubbrey suit; (c) that the State shall intervene as a plaintiff in said suit, or, if the Court determines that the State may not intervene as a plaintiff, that the State shall participate as amicus curiae; (d) that at least one or more of the plaintiffs in each of the other purported class actions referred to in paragraph A-1 shall intervene as plaintiffs in McCubbrey and (e) that solely for the purposes of conditional certification of a class action in connection with this settlement, such other plaintiffs, and at least one named plaintiff in McCubbrey, shall be deemed to represent the Class.

J-2. State Action. The state shall file an amended complaint in *People of the State of California v. Boise Cascade Recreation Communities of Delaware, et al.*, Civil No. 127902, California Superior Court in and for the County of Contra Costa. Said amended complaint shall be substantially in the form of Exhibit J hereto.

J-3. Stay of Other Actions. After the filing of amended complaints as provided above, the parties shall stipulate in each of the remaining subject actions that by reason of and for purposes of this settlement, the appropriate action on behalf of the Class is the McCubbrey action, and that the purported Class representatives in the remainder of the actions in paragraph A-1 shall be deemed not to represent the Class as alleged therein. It shall further be stipulated in said actions that the class action claims in said suits may thereupon be stayed for all purposes until there has been a final determination in McCubbrey with respect to the request for approval of this settlement.

J-4. Presentation of Settlement to Court. Upon the filing of amended complaints as above provided, this agreement shall be filed with the Court in the McCubbrey action, together with joint motions for an order conditionally certifying that action as a class action for purposes of this settlement, for a preliminary determination that the terms of settlement are fair, just and reasonable and for orders approving and directing sending of the notice described in paragraph F-1 above and setting a hearing to consider final approval of the settlement and all objections to its fairness.

J-5. Dismissal of Class Action Claims. When the last of the following events have occurred:

(1) the Court in McCubbrey has entered the Settlement Order as provided in paragraph D-2,

(2) the time for appeal from such order has expired or said order has been affirmed on appeal, and

(3) the period specified in paragraph H-1-a for exercise of any option under Section H has expired without exercise of such option,

then counsel for the various parties will seek orders dismissing with prejudice the class action claims in each of the other actions specified in paragraph A-1, and all claims for monetary relief in People v. Boise Cascade Recreation Communities of Delaware, et al., Civil No. 127902, Contra Costa County Superior Court, but any individual private plaintiff in any of said actions who elects exclusion from the Class shall be entitled to pursue his individual claim in such pending action and such individual claims and actions shall not be dismissed.

J-6. Subject to the provisions of paragraph E-5, the Court shall retain jurisdiction to supervise and enforce performance of this Agreement.

K. Publicity.

In recognition of the importance of regulating the timing and content of all public disclosures and announcements respecting the settlement, the parties agree that no press release, news conference, mass mailing or other mass communication of any kind will be made with respect to the settlement by any attorneys for the Class. Rather, any public announcement shall be made by Boise or the State. These announcements will be made jointly where feasible and, in other circumstances, the parties proposing to make such an announcement will give to the other and shall furnish it with an advance copy of the communication if it is in writing.

L. Disclaimers

Irrespective of whether or not this settlement is approved by the Court, nothing contained in this agreement shall be construed at any time or place to be an admission by Boise of any liability to any party or person in any of the above-referenced actions, nor shall the making of this settlement or anything contained in this agreement be construed as an admission that the State may seek restitutionary or other monetary relief on behalf of purchasers of land from Boise or that any of the above-referenced actions may appropriately proceed as class suits on behalf of any class of persons whatsoever. In this connection, it is expressly agreed by the parties hereto that any order approving these cases, or any of them, as a class action, shall be deemed made for the purposes of settlement only and shall be vacated and withdrawn by stipulation of all parties in the event that the settlement is for any reason not effectuated. It is further agreed that no evidence of this agreement and settlement or any of its terms, or Exhibits hereto, and no evidence of any discussions or communications made or information or materials transmitted in the course of negotiations for this settlement or in any Court conferences or hearings in connection with this settlement, and none of the claims filed with the Attorney General pursuant to this settlement and none of the determinations of said claims (either by the Attorney General or on appeals under paragraph F-11), shall be admissible or presented in any action or proceeding before any court, agency or other tribunal, as evidence of any of the facts alleged in the Amended Complaints (Exhibits H and J), or as evidence that Boise has committed any violation of law or is liable to any person for any reason other than the enforcement or breach of this Agreement, or as evidence that any of the above-referenced actions or any other action against Boise may properly be maintained as class actions. Likewise, nothing in this Agreement or in any of the aforesaid discussions, communications, information, materials, claims or determinations shall be construed or admissible or offered, in any such action or proceeding, as admissions of any kind on the part of the State, the undersigned plaintiffs or the Class, provided, however, that if this agreement is finally approved by the Court, nothing herein shall preclude

Boise from using this agreement or any of its terms or the making or performance thereof, as evidence for any purpose in any action or proceeding before any court, agency or other tribunal, or from using evidence of the filing, allowance or disallowance of any class member's claim submitted pursuant to paragraph F-4 hereunder, as evidence in support of a res judicata defense to any claim or action brought or asserted against Boise by the same class member. All claims, materials and evidence produced or presented to or obtained by the Attorney General or the Settlement Committee in receiving, investigating or reviewing claims of class members submitted pursuant to this settlement shall not be disclosed by the Attorney General or the Settlement Committee to any other persons.

M. Cooperation

In order to secure the expeditious implementation of the settlement contemplated by this Agreement, the various parties and their counsel agree to take all steps and execute all documents necessary to give effect to and carry out the settlement.

N. Application to Court for Early Distribution

Notwithstanding anything to the contrary herein, the Court shall have the discretionary power, upon application of any party to this Agreement, to fix a computation date and order the restitution fund distributed to claimants whose claims have been allowed despite the pendency, at the time of such order, of an appeal or appeals filed pursuant to paragraph F-11; provided that the aggregate claims at issue on such appeals are determined by the Court to be insubstantial in relation to the total restitution fund. Such early distribution shall not be made unless all of the following conditions are satisfied: (a) the total of the claims at issue on such appeals could under any circumstances affect the method of restitution to be employed under Section G; (b) the order applied for could not under any circumstances result in the fund available for distribution (as defined under applicable paragraphs of Section G) being exceeded by the total of the amounts which are distributed and which are chargeable against the fund under the provisions of Section G as modified by any such court-ordered early computation date; (c) except as otherwise provided in paragraph N-1 below such order does not result in changing the amount to which any claimant becomes entitled under the provisions of paragraph G (excepting any changes necessarily resulting from any such earlier computation date); (d) there shall be no early distribution on any claims until there has been full satisfaction of the conditions specified in paragraphs G-6-c(1) and (2), and of paragraphs G-6-c(3) and (4) with respect to all claims on which early distribution is made; and (e) there is withheld from any such early distribution a reserve sufficient to cover the full amount of all claims which are subject to such appeals.

N-1. If after a court-ordered distribution pursuant to paragraph N, one or more pending appeals is resolved against the appellant, the Court shall have complete discretion to order disposition of the funds reserved against such appeal in a manner consistent with the interests of justice and the purposes of this Agreement. Unless the amount in such reserve is substantial enough to bear the costs of mailing further pro rata distribution to allowed claimants (which costs shall be chargeable against such fund), the Court may order said sum paid to an appropriate charity.

DATED: February 1, 1973.

BOISE CASCADE HOME & LAND
CORPORATION

By /s/ George E. McCown

BOISE CASCADE CORPORATION

By /s/ George E. McCown

THE STATE OF CALIFORNIA AND ITS
POLITICAL SUBDIVISIONS, ACTING
THROUGH:

EVELLE J. YOUNGER, Attorney General
of the State of California

By /s/ Jay S. Linderman
Jay S. Linderman
Deputy Attorney General

WILLIAM O'MALLEY, District Attorney
of the County of Contra Costa

By /s/ Samuel Mesnick
Samuel Mesnick
Assistant District Attorney

HAROLD A. BERLINER, District
Attorney of the County of Nevada

By /s/ Harold A. Berliner

JOHN M. PRICE, District Attorney
of the County of Sacramento

By /s/ Gordon F. Bowley
Gordon F. Bowley,
Deputy District Attorney

CERTAIN REPRESENTATIVE PLAINTIFFS IN THE ACTIONS DESCRIBED ABOVE, SIGNING FOR THEMSELVES AND FOR THE CLASS:

/s/ J. Bruce McCubbrey
J. Bruce McCubbrey

/s/ Joel P. Michel
Joel P. Michel

/s/ Elisabeth Schlaepfer
Elisabeth Schlaepfer

/s/ James E. Browne
James E. Browne

/s/ T. T. Chiao
T. T. Chiao

/s/ Richard M. Head
Richard M. Head

/s/ Abel Martinez
Abel Martinez

/s/ Edwin J. Zinman
Edwin J. Zinman

/s/ Gail M. Carli
Gail M. Carli

APPROVED:

ROBERT C. HARRIS
WEYMAN I. LUNDQUIST
RICHARD L. GOFF
STEPHEN V. BOMSE
DOUGLAS M. SCHWAB
HELLER, EHRMAN, WHITE &
McAULIFFE

By /s/ Robert C. Harris
Robert C. Harris

Attorneys for Boise Cascade Home &
Land Corporation and Boise Cascade
Corporation

RONALD LOVITT
J. THOMAS HANNAN
LOVITT & HANNAN

By /s/ Ronald Lovitt

THOMAS ELKE

By /s/ Ronald Lovitt

BURTON J. GOLDSTEIN
P. M. BARCELOUX
ALBERT E. LEVY
RALPH GOLUB
GOLDSTEIN, BARCELOUX &
GOLDSTEIN

By /s/ Ralph Golub

JOSEPH W. COTCHETT
ROBERT B. HUTCHINSON
COTCHETT & HUTCHINSON

By /s/ Robert B. Hutchinson

Attorneys for the Class and for Plaintiffs in McCubbrey, et al. v. Boise Cascade, Inc., et al., (United States District Court, N.D. Cal.), in Head, et al. v. Boise Cascade, Inc., et al., (United States District Court for the District of Nevada), and in

McCubbrey, et al. v. Boise Cascade, Inc., et al. (San Mateo County, California Superior Court)

JERRY CARR WHITEHEAD
BREEN, YOUNG, WHITEHEAD & HOY

By /s/ Jerry Carr Whitehead

Attorneys for the Class and for Plaintiffs in Head, et al. v. Boise Cascade, Inc., et al. (United States District Court for the District of Nevada)

RICHARD N. SALLE
BECKLAND, SINER, TAKETA & SALLE

By /s/ Richard N. Salle

Attorneys for the Class and for Plaintiffs in Chiao, et al. v. Boise Cascade Recreation Communities of Delaware, et al. (Contra Costa County, California Superior Court)

FREDERICK E. WATSON

By /s/ F. E. Watson

MARTIN TITCOMB

By /s/ Martin Titcomb

BARFIELD, BARFIELD, DRYDEN & RUANE

By /s/ Robert E. Dryden

STARK, STEWART, SIMON & SPARROWE

By /s/ John F. Banker

Attorneys for the Class and for Plaintiffs in Zinman, et al. v. Boise Cascade Corporation, et al. (Santa Clara County, California Superior Court)

JOHN J. MURRAY

By /s/ John J. Murray

Attorney for the Class and for Plaintiff in Carli v. Boise Cascade Recreation Communities of Delaware, et al. (San Francisco County Superior Court)

APPENDIX G

December 20, 1972

William A. O'Malley
District Attorney of Contra Costa County
Court House, 4th Floor
P. O. Box 670
Martinez, California   94553' (sic)

Attn: Samuel H. Mesnick, Assistant
District Attorney

RE: BOISE CASCADE RECREATIONAL LAND SETTLEMENT AGREEMENT

Dear Mr. O'Malley:

We were pleased to see that the Attorney General of California and the District Attorney's of Nevada and Contra Costa County have reached a settlement in the above matter as regards their claims.

However, having filed several separate actions in this matter including the initial class action of Carli v. Boise, filed in San Francisco, October 12, 1971 and having settled our law suit filed against Boise in Calaveras County, we do not feel your proposed settlement has any merit whatsoever.

Unfortunately, especially as regards the Diamond XX, Circle XX and Bar XX, the little people who paid money for three and four years on that property still cannot subdivide, still have no highway, still have improper water and sewage conditions and these are things that Boise cannot rectify. Boise still does not own the reservoir on Diamond XX.

Boise's statement of not being at fault in this matter is ludicrous and made only to improve Boise's image and stabilize the value of its stock on the market.

The people should be made whole in this matter and we will pursue the litigation until my clients are properly compensated for the wrong done them.

Since we were not a party to any negotiations, we do not feel bound by your settlement unless we have some understanding of how my clients interests are protected and to what extent. Would you kindly identify the attorneys that participated in your settlement discussions.

We would request at this time that you advise us of the hearing date in this matter so we may appear.

Very truly yours,

JOHN J. MURRAY

JJM:cmc

ccs: Evelle J. Younger
Robert Desky
Richard N. Salle
Weyman I. Lundquist

APPENDIX H

March 14, 1973

Mr. John Murray
Attorney at Law
785 Market Street, #700
San Francisco, California 94103

Dear John:

This letter is to confirm our understanding with respect to your fee participation in the consolidated Boise Cascade Class Action. Boise has agreed to provide a sum of $22,500.00 to the class action attorneys for expenses, with the understanding that this amount will provide a portion of your fee, and will be paid to you. In addition to the $22,500.00, I will pay to you from my net fee a maximum of 15%, or such lesser sum as is necessary to make your total fee $45,000.00. If the fees awarded by the Court, less expenses of administration are such that 15% of my net fee is less than $22,500.00, you will accept such lesser sum in addition to the initial $22,500.00 to be paid to you, as indicated above.

If the foregoing constitutes an accurate memorandum of our understanding, please sign the original of this letter, where indicated, and return the same to me. I will then distribute copies to our various co-counsel for their files.

Very truly yours,

/s/ Richard N. Salle
RICHARD N. SALLE

RNS:ua

THE FOREGOING IS AGREED TO

/s/ John J. Murray
John Murray

March 29, 1973

Mr. Richard N. Salle
Becklund, Siner, Taketa & Salle
Sumitomo Bank Building
515 North First Street
San Jose, California 95112

Dear Dick:

Enclosed please find the signed understanding with respect to my fee participation in the consolidated Boise Cascade class action.

The only ambiguity I find with the understanding is that the $22,500 that is provided by Boise for expenses is actually to be paid me directly and will in no way be diminished by the payment of any expenses. When read in your letter it is most clear, but in light of Section I-2 of the settlement agreement, it could be misconstrued by other counsel participating in the settlement.

I would request that you provide other counsel with a copy of our understanding so that they might be better informed.

We understand further that the portion of my fee payable from your fee will be reduced proportionately depending upon the amount of expenses incurred by the settlement committee. If my analysis of the understanding conflicts with yours, would you so advise; otherwise, I will assume that we are in accord.

Thank you very much for your consideration and cooperation in this matter.

Very truly yours,
/s/ John J. Murray
John J. Murray

JJM:lkr
Enclosure

APPENDIX I

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHAEL VALERIO,)
et al.,)
)
Plaintiffs,) No. C-77-0937 RFP
)
vs.) AFFIDAVIT OF
) IRVING SULMEYER
BOISE CASCADE)
CORPORATION,)
et al.,)
)
Defendants.)
)

STATE OF CALIFORNIA)
) SS.
COUNTY OF LOS ANGELES)

IRVING SULMEYER, being first duly sworn, deposes and says that:

I am an attorney at law, licensed to practice law in the State of California, since 1952. I am also admitted to practice before the United States District Court for the Southern District of California, Central District of

California, and Northern District of California. I am also admitted to practice before the Court of Appeals for the Ninth Circuit, and before the United States Supreme Court. I am a member of Sulmeyer, Kupetz, Baumann & Rothman, a professional corporation, and I have specialized in matters relating to debtor-creditor relations, insolvency and proceedings under the Bankruptcy Act for approximately the last twenty-five years.

I have lectured in programs relating to insolvency practice sponsored by the Continuing Education of the Bar, State Bar of California, and in programs sponsored by the Los Angeles County Bar Association, Bankruptcy and Commercial Law Section.

In the course of my experience, I

have been involved in literally thousands of straight bankruptcy proceedings, wage-earner proceedings under Chapter XIII, real property arrangements under Chapter XII, arrangement proceedings under Chapter XI, and corporate reorganization proceedings under Chapter X of the Bankruptcy Act. I have acted as a Receiver in Chapter XI proceedings, Trustee in Bankruptcy and under Chapter XII proceedings, and Trustee in proceedings under Chapter X of the Bankruptcy Act. I have acted as counsel for the bankrupt, and for debtors, as well as counsel for secured creditors, and counsel for unsecured creditors. In the corporate reorganization proceedings of Equity Funding Corporation of America, in the Central District of

California, I represented two mid-western banks, and two eastern banks, comprising a substantial portion of the unsecured claims in the case. In the matter of the corporate reorganization of University City under Chapter X of the Bankruptcy Act, I represented the Reorganization Trustee, now United States District Judge William Enright. In the matter of Fox Markets, Inc., I was the Reorganization Trustee. At the present time, my colleague, Arnold L. Kupetz and I are Co-Reorganization Trustees of the estate of Bubble Up Corporation, now pending in the United States District Court for the Central District of California, before the Honorable Francis C. Whelan, District Judge.

I have also been involved in other

reorganization proceedings not herein mentioned.

By virtue of my experience in insolvency cases, large and small, I have developed some reputation in the field and some degree of expertise.

I have been requested by Ernest M. Thayer, Esq. to submit this affidavit, and in connection therewith, there has been submitted to me and I have examined, the following documents:

A. Boise Cascade 1972 Annual Report.

B. Boise Cascade Form 10-K for 1972.

C. Boise Cascade Form 10-Q for Third Quarter of 1972.

D. Transcripts of the hearings of March 9 and May 15, 1973.

E. Application for Attorneys (sic)

Fees by the attorneys in the class action of McCubbrey v. Boise Cascade Home and Land Corporation, et al., U.S.D.C., Northern District of California, No. C-72-470-RFP.

F. Affidavit of Edward W. Cleary of May 14, 1973, filed in the McCubbrey action.

G. Plaintiffs' Memorandum filed on August 10, 1977, in the instant action.

H. The Affidavit of Lee P. Cordon, C.P.A., annexed to the above Memorandum.

I. Affidavit of William Kelly, Esq., annexed to the Memorandum described in item G.

J. Defense attorney's response to item G.

K. Plaintiffs' Memorandum of September 26, 1977, in support of cross-motion for partial summary judgment.

L. Motion of attorney/defendant Frederick E. Watson for dismissal of summary judgment.

M. Affidavit of attorney/defendant Frederick E. Watson in support of above-mentioned motion.

N. Copies of the creditors' agreements between Boise Cascade and its major creditors.

In submitting this affidavit, I have been asked to make certain assumptions. The assumptions that I have made are as follows:

A. That an alter-ego or agency relationship exists between Boise Cascade Corporation and Boise Cascade

Home and Land Corporation, and that whatever claims the plaintiffs have in the matter of McCubbrey v. Boise Cascade Home and Land et al., can and will be established as claims against the parent, Boise Cascade Corporation.

B. The accuracy of the financial information contained in the Boise Cascade 1972 Annual Report, Form 10-K for 1972, and Form 10-Q for third quarter of 1972.

C. The reality and fairness of the shareholder equity shown therein in the approximate sum of $666,000,000.00.

D. The extent of the McCubbrey class compensatory claims in the amount of $350,000,000.00.

On the basis of my review of the foregoing documents and the assumptions listed above, I have been asked to give my opinion with reference to a number of questions set forth below as follows:

1. In your opinion, was a proceeding under the Bankruptcy Act by or against Boise Cascade Corporation imminent at the time of preliminary or final Court approval of the settlement in the McCubbrey class action?

We tend to agree with the affidavit of William Kelly above referred to, that it is impossible to state with any reasonable assurance from the documents submitted to us, whether or not a voluntary or involuntary proceeding under the Bankruptcy Act with respect to Boise Cascade Corporation and/or its wholly-owned subsidiary Boise Cascade Home and Land was imminent at the time the District Court made its preliminary order of approval in March of 1973, or its final order of approval in May of 1973. In our opinion, any conclusion as to the imminence of a proceeding under the Bankruptcy Act by or against the Boise Cascade entities at that period of time in 1973, would be purely speculative.

2. In your opinion, would the filing of a proceeding under the Bankruptcy Act by or against Boise Cascade Corporation in mid-1973 adversely affect the recoverability on any judgment obtained by the class action plaintiffs in the McCubbrey case?

This is a more significant question than the first. Even if we assume that a proceeding under the Bankruptcy Act would be filed, if that proceeding would not detrimentally affect the collectability of any judgment obtained by the class action plaintiffs then the filing, or non-filing, of such a proceeding should be deemed an irrelevant fact by the class action Court. In approaching our answer to this question, we must recognize a number of fundamental truths about bankruptcy proceedings. First, creditors will be paid before shareholders. This is true in ordinary bankruptcy, in Chapter X under the absolute priority rule ("fair and equitable") and in Chapters XI and XII under the "best interests of creditors" rule. In Chapters XI and XII, a plan can be confirmed if creditors would receive as much or more than they would receive upon liquidation in ordinary bankruptcy. Second, depending on the nature of the assets of a particular debtor company, going-concern value thereof may be detrimentally affected by the institution of proceedings under the Bankruptcy Act. Obviously, the on-going value of a service-type business, with a limited amount of fixed assets, would be more adversely affected by the institution of proceedings under the Bankruptcy Act than a manufacturing business with substantial fixed assets, the value of which, in turn, would be more adversely affected by such proceedings than say a farming or ranching business, whose main value lies almost entirely in the land and improvements thereon.

If we assume, as we have above, that the financial statements are correct and that under sound generally accepted accounting procedures there is a stockholders' equity in Boise Cascade Corporation over $666,000,000.00, then, even in the worst of circumstances, that is, orderly liquidation in straight bankruptcy (the most unlikely situation), there would appear to be sufficient assets to meet the maximum claim of the class action plaintiffs of $350,000,000.00. While securities might be tendered to creditors in a reorganization proceeding under Chapter X, to meet the test of absolute priority in a solvent corporation situation, the securities must have a value equal to the claim before anything is provided for shareholders. Presumably the securities could then be sold by the class action plaintiffs to realize the cash, should they so desire.

We, therefore, conclude that even if a proceeding under the Bankruptcy Act were filed in mid-1973 by Boise Cascade Corporation, under the assumptions made herein, that filing would be immaterial insofar as the collectability of a class action judgment is concerned.

3. If the "financial distress" of Boise Cascade Corporation and its alleged inability to respond to a judgment if the settlement were not approved, played a significant role in the approval of the compromise settlement, would you think that such consideration was misplaced, in light of the facts presented to you?

Speaking solely on the basis of the record you have presented to me, I would have to answer your question in the affirmative.

4. If a proceeding under the Bankruptcy Act were filed by or against Boise Cascade Corporation and/or Boise Cascade Home and Land Corporation, could a class action be prosecuted in the bankruptcy proceeding?

In my opinion, yes. The argument presented by attorney Frederick E. Watson in his Memorandum of Points and Authorities in Support of Motion to Dismiss an Alternative Motion for Summary Judgment and the points and authorities cited in connection therewith (page 52, 52a and 53) are incorrect and obsolete. Originally, §57a provided that a proof of claim should be signed by the creditor. This has now been superseded by Rule 301(a) which provides that a creditor's claim can be executed by the creditor "or his authorized "agent". Class action Rule 23 of the Federal Rules of Civil Procedure is expressly made applicable to bankruptcy proceedings by Bankruptcy Rule 723, which is in turn expressly made applicable to Chapter X proceedings by Rule 10-701 and is similarly made applicable to Chapters XI and XII. The Rules of Bankruptcy Procedure were approved by the Supreme Court on April 24, 1973, and submitted to Congress, which did not disapprove them, and said Rules came into effect on or about July 1, 1973. The Chapter X Rules came into effect in 1975. For years prior to the adoption of the Bankruptcy Rules, they had been circulated for consideration and recommendation by the Bar. Attorneys reasonably familiar and experienced in bankruptcy practice were aware that there was no substantial opposition to the enactment of the Bankruptcy Rules per se, and that in all likelihood, the Rules proposed by the Advisory Committee would be approved by the Supreme Court and not disapproved by Congress. In our opinion, Rule 301, Rule 723 and Rule 10-701 were non-controversial Rules. It would, therefore, be our opinion that in say, January, 1973, an attorney reasonably experienced and familiar with bankruptcy practice, would have anticipated that Rules permitting class actions in bankruptcy would become effective in the forseeable future.

One further point should be noted. Even under the old law, if class actions would not lie for technical reasons, the Bankruptcy Court always had the power to allow the class action suit to proceed in another tribunal in order to promote the interests of justice. Even under the present Rules, the Bankruptcy Court, having the power to entertain a class action, could, nevertheless, decline to entertain it and could permit the class action to proceed in the forum where it was pending prior to the institution of the proceedings under the Bankruptcy Act.

Thus, even from the tactical standpoint mentioned by Mr. Watson in his memorandum, we fail to see any substantial adverse effect upon the collectability of the class action judgment by virtue of the institution of proceedings under the Bankruptcy Act.

We must conclude this affidavit by two cautionary notes. One, we cannot state to what extent the considerations mentioned herein affected the District Judge's thinking in approving the settlement. Two, it is possible with Boise Cascade as indeed with any on-going company, that on-going business operations could increase losses, exhaust equities and render such company ultimately insolvent. It is equally possible that on-going operations would be profitable and increase the shareholders' equity and the solvency of the company. We note here that Boise Cascade did take the responsible position of discontinuing its loss-engendering real property activities, did sell off surplus business entities, and did apparently restrict itself to a leaner, more profitable operation.

/s/ Irving Sulmeyer
IRVING SULMEYER

Subscribed and sworn to before me this 21st day of November, 1977.

/s/ Anne Berryman
Notary Public for the State of California

APPENDIX J

TO OUR SHAREHOLDERS

Boise Cascade, after taking an extraordinary charge of $195 million, incurred a net loss of $170.6 million in 1972. Our continuing businesses earned $40.4 million during the same period.

This has been a time of dramatic change for the company. The process of transition which began in mid-1972 was both sweeping and painful. It was also absolutely essential to the future success of our company.

During this period, top management was reorganized, unprofitable realty operations were discontinued, reserves for Latin American investments were increased and non-realty businesses which were not necessary for our long-term growth and development were sold.

The reorganization of top management was accomplished in two stages. Stage one occurred in June when John B. Fery, formerly an executive vice president, was elected president. Stephen B. Moser, also a former executive vice president, was elected to the newly-created position of vice chairman of the board. Stage two occurred in October when R. V. Hansberger resigned as chairman, and the board of directors named Fery as the company's chief executive officer and elected Moser chairman of the board.

To provide for the future costs of discontinuing our realty operation and to increase our reserve for Latin American investments, the company incurred an extraordinary charge. The after-tax extraordinary charge of $200 million was taken against income in the second quarter of 1972.

A program to sell nonessential businesses and investments outside of our realty group was initiated in early 1972. Later in the year, as a result of the extraordinary charge, this program was reevaluated and substantially expanded. It gained full momentum during the last two months of 1972 and the first two months of 1973. The $370 million cash proceeds received from the program have greatly strengthened our balance sheet through a 35 percent reduction of total long-term debt since December 31, 1971, and have provided us with additional money to fund continuing capital programs in our building materials, manufactured housing and paper-related businesses. Overall, in 1972 the company realized a $5 million net gain on these sales, reducing the extraordinary charge to $195 million. In 1973 we will report a net after-tax extraordinary gain of approximately $40 million on the sale of operations in the first quarter of the year.

So that our shareholders may better understand the impact that these major developments have had on the company, our 1972 Annual Report provides a detailed description of our activities and operations. We have identified our businesses as either continuing or discontinued. This is an important distinction, because it is the continuing businesses which will serve as the foundation for the company's future earning power and growth. The description of each continuing business includes a statement of operating income, facilities list, statistical review of products manufactured and sold, an evaluation of 1972 performance and an assessment of prospects for 1973.

We encourage all of our shareholders to study thoroughly the company's 1972 Annual Report. We believe you will conclude, as we have, that Boise Cascade is financially strong and well positioned for profitability and planned growth.

/s/ John B. Fery
President and Chief Executive Officer

/s/ Stephen B. Moser
Chairman of the Board

Opposition

1

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court review the Court of Appeal's affirmance of the trial court's exercise of discretion in rejecting plaintiffs' collateral attack on a four-year-old class action judgment, raised in an effort to avoid the bar of *res judicata* and based on allegations of "fraud on the court," where those allegations are either demonstrated by the record to be false, or consist of no more than a difference of opinion regarding the characterization of facts accurately presented to the court allegedly "defrauded"?

2. Should this Court review the Court of Appeal's affirmance of the trial court's exercise of discretion in refusing to provide plaintiffs the opportunity to conduct extensive discovery in a belated search for evidence to support their factually unfounded allegations of "fraud on the court"?

3. Should petitioners be permitted to raise for the first time in this Court an issue not presented to the lower courts, namely, an argument that class actions may never be certified for the purposes of settlement only, no matter what procedures are followed by the trial court?

4. In any event, may these parties reopen the final judgment approving an already-performed class action settlement in order to relitigate claims concluded by that settlement and judgment where their attack on the judgment is no more than an attempt to substitute their own judgment, aided by years of hindsight, for that of the more than twenty class attorneys in the prior action, the California Attorney General, who negotiated the settlement on behalf of the plaintiff class, and the trial judge who approved the settlement?

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL VALERIO, et al.,
Petitioners

vs.

BOISE CASCADE CORPORATION, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS BOISE CASCADE CORPORATION, BOISE CASCADE HOME AND LAND CORPORATION, BOISE CASCADE RECREATION COMMUNITIES CORPORATION OF DELAWARE, BOISE CASCADE CREDIT CORPORATION, AND BOISE CASCADE PROPERTIES, INC.

I.

STATEMENT OF THE CASE

A. PRELIMINARY STATEMENT

Over ten years ago, plaintiffs-appellants Michael Valerio and Yung Hao Chang each purchased recreational property from a subsidiary of Boise Cascade Home & Land Corporation

("Home and Land"). (CR 5, 42-44) Several years later, in March 1973, Valerio and Chang—and over 40,000 other persons who had purchased lots in recreational subdivisions developed by Boise[1]—were notified that they were members of a class on whose behalf litigation was being prosecuted against Boise and others.[2] They were informed of the terms of a proposed class action settlement and how they could participate. The notice (CR 195) received and read by Valerio and Chang[3] also advised that they could exclude themselves from the settlement if they did not wish to be bound by its terms.

Valerio and Chang each filed a proof of claim to obtain a portion of the settlement funds. Each received and cashed a check from Boise in settlement of his claims (CR 43, 45), in addition to obtaining the non-monetary benefits of the settlement agreement.[4] Each continues to own his property.[5]

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[1] For convenience, the term "Boise" will be used herein to refer to Boise Cascade Corporation, Home & Land and/or certain of their subsidiaries, some of which are defendants in this action. Thus, the entity or entities included in the term "Boise" may differ. Boise Cascade Corporation and Home & Land will be referred to by name where pertinent to identify the particular entity being discussed. In accordance with Supreme Court Rule 28.1, the corporations on whose behalf this Opposition is filed, together with their parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates are:

> Boise Cascade Corporation, Boise Cascade Home & Land Corporation, Boise Cascade Recreation Communities Corporation of Delaware, Boise Cascade Properties, Inc., Boise Cascade Credit Corporation, Electroductos Argentinos, Compania General de Electricidad de Cordoba, Welser Wellpappen G.m.b.H., Idaho Forest Council, Inc., Boise Cascade Timberlands, Boise Southern Company, Boise Southern Newsprint Corporation, Vancouver Plywood Company, Cuban Electric Company, D.S. Investment, Lafayette Enterprises, Columbia Associates (LTD.), Sierra Highlands Water Company, Stevenson Village, Columbia Associates (LTD.), Duropack Wellpappe G.m.b.H., Cartonex Yerpackungs Agentur G.m.b.H., Schumacher G.m.b.H. Wellpapperfabric, Androscoggin Reservoir Company

[2] *McCubbrey v. Boise Cascade Home & Land Corp., et al.*, No. 72-470 RFP, U.S. Dist. Ct. (N.D.Cal.).

[3] Valerio deposition (July 5, 1977), at 23-26; Chang deposition (July 1, 1977), at 10.

[4] As part of the settlement, Boise guaranteed that $31.4 million would be available for project completion, maintenance and administration. (CR 2793)

[5] (CR 43, 45) *see also* (CR 112) (Doc. No. 13), p. 7.

Several years later, Valerio and Chang were sued in small claims court by the property-owners' associations of the subdivisions where their lots are located because of petitioners' failure to pay annual dues and assessments. (CR 43, 45) Seeking legal assistance in order to defend these small claims suits, Valerio and Chang found their cause transformed into a 37-count purported class action seeking $1.8 BILLION in damages.[6] The defendants included not only the property owners' associations which had sued Valerio and Chang, but also Boise, all the plaintiffs' attorneys in the *McCubbrey* class action, and the California Attorney General.[7]

Since the claims made by Valerio and Chang had been concluded by the court-approved settlement in *McCubbrey*, Boise moved to dismiss and for summary judgment on grounds of *res judicata*. Plaintiffs, in response to these motions, launched a collateral attack on the judgment approving the *McCubbrey* settlement.

B. FACTUAL BACKGROUND

1. The McCubbrey Litigation and Its Settlement

In the late 1960's and early 1970's, Home & Land and certain of its subsidiaries developed and marketed recreational property in twenty-two recreational subdivisions (or "projects") in parts of California and at Incline Village, Nevada. In the fall of 1971, public and private lawsuits were commenced against Boise, alleging fraud (including securities laws violations) and unfair practices in the sale of property in these projects. Several of these suits were filed as class actions. Boise denied liability and defended these actions vigorously. Boise also opposed all attempts to obtain class certification. *See* CR 2730.

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[6] (CR 101) See Judge Peckham's observations:

> The genesis of this lawsuit, as revealed by plaintiffs' depositions, raises some troublesome questions regarding the role of attorneys in the institution of litigation. Essentially, the plaintiffs went into their attorneys' offices to obtain relief in the small claims actions pending against them. They walked out with a 1.8 billion dollar lawsuit against 28 defendants alleging conspiracies between all of these defendants to do all of the acts alleged in the complaints' 37 counts. A layperson, of course, is not expected to be aware of the legal theories that are relevant to the facts he has presented to his attorney. The plaintiffs here, however, have virtually no personal knowledge of the facts underlying many of their claims. Almost invariably their response to questions seeking the sources of their allegations, was, "My attorneys told me."

(CR 2201) n.26.

[7] The California Attorney General, with the support of District Attorneys from several California counties, brought one of the actions filed against Boise (*People v. Boise Cascade Recreation Communities Corp., et al.*, No. 127902, Contra Costa County Super. Ct.), and played a primary role in the negotiation and implementation of the *McCubbrey* settlement. (CR 244-065)

In mid-1972, Boise's financial condition began to impact its stance in the litigation. Boise Cascade Corporation and Home & Land were in danger of defaulting on millions of dollars of outstanding loans. Boise obtained temporary waivers from its major institutional lenders to avoid default. (CR 2206-08) In June 1972, Boise announced its withdrawal from the recreational property business and took an extraordinary write-off of $210 million, largely due to problems stemming from that business. (CR 247, 2207) To restructure Boise's finances, the lenders insisted that Boise's liability with respect to the varied class actions be quantified and resolved. (CR 2154, 2208) Thus, serious settlement negotiations began.

It was in the suit brought against Boise by the California Attorney General that settlement negotiations commenced. In these settlement talks, in which numerous California District Attorneys and the private class attorneys also participated (CR 251-52, 2824), Boise presented confidential and detailed financial information to the plaintiffs' attorneys concerning its fiscal problems. (CR 249, 252, 2491 Doc. No. 73, at 7 and Ex. III, p. 2). The attorneys also met with representatives of the insurance companies and investment bankers who were Boise's principal lenders, and discussed directly with them Boise's financial condition and its proposed debt restructure. *Id.*

By mid-October 1972, preliminary agreement had been reached on a settlement of the public and private actions. CR 252. Representatives of the Attorney General and District Attorneys from counties throughout California met to discuss and approve the proposed compromise. *Id.* The settlement eventually encompassed several separate class actions, including the Attorney General's suit. (CR 2787) These actions were coordinated for settlement under the title of one of the class suits, *McCubbrey v. Boise Cascade Home & Land Corp.*, pending before Judge Peckham.

On March 9, 1973, a hearing was held before Judge Peckham for preliminary approval of the settlement. (CR 848) (RT, March 9, 1973—Ex. to Doc. No. 57) The court allowed the filing of an amended complaint and permitted the intervention of the Attorney General. (CR 2552) The court preliminarily approved the proposed settlement, ruled that the proposed notice to class members was adequate and ordered it mailed by the clerk. (CR 2552) A fairness hearing was set for May 15, 1973.

Notice of the proposed settlement was mailed to members of the class on or about March 23, 1973. (CR 195, 2155) The 47-page notice summarized the claims covered in the settlement and included an appendix setting forth certain portions of the *McCubbrey* Amended Complaint. (CR 211-27) The notice described in detail the terms of the settlement, including the existence of three alternative methods for distributing the settlement funds, and the circumstances which would determine the method to be used. (CR 202-07) The notice explained to class members that they could participate in or exclude themselves from the settlement; and how their choice should be exercised. (CR 198-201)

At the May 15, 1973 fairness hearing, the Attorney General and the private class attorneys reviewed the history of the litigation and the settlement negotiations, discussed the efforts of the attorneys negotiating the settlement to accommodate the varying interests of class members, and explained how the settlement would operate, if approved. (CR 244-70) Several class members appeared, either personally or through counsel, to ask questions about or object to the settlement agreement. (CR 271-308) No objections were raised to the class attorneys' fee application or to the award of $500,000 to the State of California for its costs and expenses.

Judge Peckham approved the settlement as fair and reasonable, ordered it performed, and approved the class attorneys' fee application. (CR 318-320) Final judgment was entered approving the settlement on May 21, 1973. (CR 2515)

No appeal was taken. Class members had until July 26, 1973 to file a claim to participate in the settlement or to exclude themselves from the class. (CR 2520-21)

2. The Proceedings Below

The original complaint in this action was filed on May 6, 1977. (CR 1) As amended, it alleged that, in the sale of lots and levying of assessments, Boise and the propertyowners' associations had violated federal antitrust and securities laws, and had committed fraud and unfair competition in violation of state law. It also claimed "fraud" and other wrongdoing by the attorneys who had represented the plaintiff class in *McCubbrey,* including the California Attorney General, in connection with the settlment. The 37-count complaint sought to set aside the *McCubbrey* settlement, apparently on the basis of an alleged fraud on the class, and contained a prayer for $1.8 Billion in damages.[8] (CR 38-101)

Boise moved to dismiss the complaint in its entirety, urging, among other grounds, that the claims of Valerio and Chang were barred by the settlement and judgment in *McCubbrey.* (CR 113, 127-36) On July 15, 1977, a full-day hearing was held before Judge Peckham on the motions of Boise and other parties. RT (July 15, 1977). In their brief in opposition to the defense motions and at the July 15 hearing, plaintiffs raised, for the first time, their allegations of fraud on the court. *Id.;* (CR 848 Doc. No. 57) *See also* (CR 2166)

During the July 15 hearing, plaintiffs acknowledged that the motions to dismiss could be treated as summary judgment motions, pursuant to Rule 12(b)(6). RT (July 15, 1977), p. 67-68. In fact, plaintiffs stated their desire that this be done in order that the court consider certain evidence outside the *McCubbrey* record which they themselves had offered. *Id.*

On August 21, 1978, Judge Peckham filed his opinion granting Boise's motion and dismissing plaintiff's complaint. (CR 2152) The Ninth Circuit Court of Appeals affirmed in a

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[8] Count XV of the Amended Complaint, titled "Pendent Fraud Claims," purports to state a claim for malpractice and breach of fiduciary duty by the *McCubbrey* class attorneys and for a fraud on the class. (CR 71-75.) The complaint nowhere alleges any fraud on the court.

per curiam opinion, in which the Court stated that it had carefully considered all of appellants' arguments, and found them to be fully answered in Judge Peckham's opinion.

II.

ARGUMENT

A. INTRODUCTION

There are several means by which Valerio and Chang could have objected to the *McCubbrey* settlement if they believed it to be inadequate or unfair. They could have appeared at the May 15, 1973 fairness hearing, or appealed from the judgment approving the settlement. They could have made a timely motion under Rule 60(b)(1)-(3) to set aside the judgment on grounds of mistake or neglect, newly discovered evidence, or "fraud, . . . misrepresentation, or other misconduct of an adverse party." Plaintiffs pursued none of these avenues; and the opportunity to do so had long since passed by the time they commenced their collateral attack.[9] As a result, plaintiffs attempted to fit their objections to the *McCubbrey* judgment into the category of "fraud on the court."

Judge Peckham, the same judge who was allegedly "defrauded," considered these charges. He conducted a careful review of the record in the *McCubbrey* action, and determined that the alleged facts relied on by plaintiffs, even if true, did not constitute fraud on the court, but instead, at most, suggested a disagreement over the wisdom of the *McCubbrey* settlement. Judge Peckham also exercised his discretion to deny plaintiff's request to conduct extensive and burdensome discovery in an attempt to find some evidence to support plaintiffs' unfounded allegations. The Ninth Circuit has affirmed, approving Judge Peckham's conclusion and exercise of discretion. There is no reason for this court to conduct yet another review of the extensive record in this case to again conclude that there was no fraud on the court or abuse of discretion.

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[9] Similarly, an attack on the settlement on any of the grounds stated in Rule 60(b)(4)-(6) must be made "within a reasonable time." As stated by Judge Peckham, any claim governed by that standard of timeliness would be barred by laches, due to plaintiff's lack of diligence and Boise's change of position. (CR 2196 n.13.)

B. PETITIONERS ARE ASKING THIS COURT TO SECOND GUESS THE EXTENSIVE ANALYSIS OF THE RECORD PERFORMED BY THE LOWER COURTS WHICH REVEALED THAT THERE WAS NO FRAUD ON THE COURT

Plaintiffs attempt to avoid the *res judicata* effect of the *McCubbrey* settlement by asserting that that settlement was procured through fraud on the court. At the outset, this charge, leveled against the Attorney General of the State of California, several district attorneys, and numerous well respected private attorneys, is inherently incredible. As Judge Peckham stated in his opinion,

> "the charge against the attorneys is extremely troublesome: not because it has any merit, but because it so obviously does not. It is difficult enough to believe that more than twenty respected members of the bar representing clients in six separate actions would conspire to defraud their clients and this court. The fact that the Attorney General and several district attorneys actively participated in the *McCubbrey* negotiations and settlement on behalf of all the district attorneys of California and the people of the State only serves to heighten our incredulity. Analysis of the allegations made against the attorneys confirms our belief that this charge of fraud on the court was unjustifiably and recklessly made." (CR 2161)

Judge Peckham, who was the same judge who supposedly was defrauded into approving the *McCubbrey* settlement, reviewed in detail the facts and the record which plaintiffs alleged indicated that there was fraud on the court. He concluded that plaintiffs' allegations, even if true, when analyzed in detail and in their context, failed to rise to the level of fraud on the court:

> ". . . it is clear that even assuming the truth of all of these allegations, they do not establish fraud on the court . . . . Our review of the allegations concerning the conduct of the class attorneys, however, reveals that the charge against them is not really that they committed fraud upon the court, but rather that they exercised poor judgment in recommending approval of the settlement." (CR 2164)

The Ninth Circuit also closely examined plaintiffs' factual arguments, and stated that Judge Peckham's opinion resolved all of those arguments.

Now, plaintiffs are asking this court to conduct its own review of the record, to determine whether any of plaintiffs' allegations rise to the level of fraud on the court. Plaintiffs can point to no reason why such an extensive factual review is of sufficient importance to justify a writ of certiorari under the standards outlined in Rule 17.1 of the Rules of the Supreme Court. The extensiveness and detailed nature of such a review is indicated by the lengthy discussion in Judge Peckham's opinion. Plaintiffs' own petition for writ of certiorari reveals the picayune level at which they have searched the records to attempt to find facts to support their claim of fraud on the court. (See Footnotes 3 through 5 of the Petition.)

Further, the standard for review of Judge Peckham's decision is the narrow one of abuse of discretion. Any application to set aside a judgment is addressed to the trial court's discretion. *See, e.g., Rodriguez v. Southern Pacific Transportation Co.,* 587 F.2d 980, 981 (9th Cir. 1978); *Martella v. Marine Cooks & Stewards Union,* 448 F.2d 729, 730 (9th Cir. 1971); *cert. denied,* 405 U.S. 974 (1972) *Kolstad v. United States,* 262 F.2d 839, 843 n.3 (9th Cir. 1959). This is true whether the basis for the attack is a Rule 60(b) ground, or fraud on the court (*see England v. Doyle,* 281 F.2d 304 (9th Cir. 1960); *United States v. Standard Oil Co.,* 73 F.R.D. 612 (N.D. Cal. 1977), *rev'd on other grounds,* 603 F.2d 100 (9th Cir. 1979); and whether the attack is made by motion or by an independent action. *See H.K. Porter Co. v. Goodyear Tire & Rubber Co.,* 536 F.2d 1115 (6th Cir. 1976). The standard for appellate review, then, is whether or not the trial court abused its discretion. *See, e g., Bennett v. Federal Deposit Insurance Corp.,* 396 F.2d 909, 911 (9th Cir. 1968); *Atchison, T. & S.F. Ry. Co. v. Barrett,* 246 F.2d 846 (9th Cir. 1957); *Cole v. Fairview Development, Inc.,* 226 F.2d 175, 176 (9th Cir. 1955), *cert. denied,* 350 U.S. 995 (1956).

Thus, Boise submits that it is inappropriate for this Court to embark on the factual analyses requested by plaintiffs, to review once again whether the trial court abused its discretion.

However, defendants cannot sit silently by while plaintiffs mischaracterize the facts in an attempt to create an illusion of fraud on the court. Therefore, Boise briefly will address plaintiffs' allegations.

Throughout the proceedings below, plaintiffs' main claim has been that the Attorney General and the class attorneys allegedly defrauded the court by "falsely representing to the court that Boise could pay no more money" than was provided for in the settlement (Petition, pg. 7). The settlement, of course, was based on many factors, including uncertainty whether the plaintiffs could prove their case. As the parties explained to Judge Peckham in the *McCubbrey* action, most serious questions existed as to whether, if litigation proceeded, any purchaser could successfully carry his burden of proof on numerous essential and highly contested issues.[10]

An additional factor compounding the uncertainties of proceeding with litigation was the financial difficulties of Boise Home and Land and its corporate parent, Boise Cascade Corporation. The facts concerning Boise's financial condition were summarized in the affidavit of Edward W. Cleary, (CR 2203-09) who was Vice President and Treasurer of Boise Cascade Corporation at the time. Plaintiffs do not seriously contest the accuracy of the facts in the Cleary declaration. Rather, plaintiffs feel that the Attorney General and class attorneys were overly pessimistic in their characterization of the risks engendered by Boise's financial problems. Plaintiffs sought to support this charge by submitting affidavits from so-called "insolvency experts"—only one of whom, four years after the fact, said that he would have reached more optimistic conclusions.

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[10] These included the content of representations, whether they were true or false, whether they were made with knowledge of falsity or lack of reasonable grounds for believing their truth, whether the salesman acted within or beyond his employment, and whether the statute of limitations was tolled in the case of the many who purchased more than three years before commencement of litigation. The obstacles faced by the *McCubbrey* plaintiffs in prevailing on these issues were summarized in the Memorandum re Factual and Legal Issues Involved in Actions Subject to Proposed Settlement, filed with the court. (CR 2514 Doc. No. 77)

Judge Peckham analyzed these affidavits, and concluded that there was here no evidence of fraud:

> "Neither these affidavits nor the newspaper articles submitted by plaintiffs provide any evidence that a fraud was committed upon this court." (CR 2169)

Judge Peckham concluded that plaintiffs were simply disagreeing with the judgment of the Attorney General and the class plaintiffs as to whether the settlement was a good one. At most, plaintiffs conjure up a difference of opinion. That, however, does not raise an inference of intentional misrepresentation. As Judge Peckham stated,

> "Plaintiffs may dispute the wisdom of the inferences and the decisions that were based upon the information provided by Boise, but they have given us no reason to believe that that information was false." (CR 2166)

Thus, upon analysis of plaintiffs' own evidence, plaintiffs' suggestion that the financial condition of Boise was misrepresented to the court is shown to be without any foundation in fact.

Plaintiffs also repeatedly assert that the attorneys for the class in *McCubbrey* rejected "a higher settlement offer which did not specify any amount for attorneys' fees and costs in preference for a lower one which 'locked in' over $2.5 million therefor," (Petition, pg. 5). Plaintiffs base this unfounded allegation on a comparison of a memorandum dated October, 1972, outlining Boise's counsel's views for a proposed settlement procedure with the final settlement. In fact, the October 1972 document upon which plaintiffs rely (CR 1858) led to further negotiations and a final agreement with terms *more* favorable to the class than those suggested in the draft proposal. In particular, the fund available for restitution to class members and for attorneys' fees and expenses was higher under the final agreement than the amount suggested in the draft proposal; and restitution funds were applied both for cash refunds and towards reduction of unpaid note balances, rather than solely the latter.

Furthermore, the settlement agreement did not offer any lesser benefits than those suggested in the draft outline. The only lower dollar amounts represented the difference between Boise's approximation of expenditures for project improvement and maintenance in the October 1972 outline, and the updated estimates of those costs contained in the final agreement, the amount of which had declined due to monies actually spent for such purposes during the pendency of settlement discussions. *That fact and the amount of those reductions were fully explained to the court*—in the settlement agreement (CR 2792-93) at the March 9, 1973, hearing (RT, Page 31), and at the May 15, 1973, fairness hearing. (CR 254-55) As to these expenditures, the preliminary outline and the settlement agreement provided for identical benefits: the undertaking and guarantee of completion of project improvements and administration of developments to the degree contemplated by the California Real Estate Commissioner's public reports.[11]

The preceding discussion, of course, does not attempt to discuss all of the facts in the record which show that plaintiffs' allegations of fraud on the court are without foundation. It is clear, however, that the trial court and the Ninth Circuit were amply justified in concluding, after reviewing the factual basis for plaintiffs' arguments, that those arguments were specious. We are confident that if this court were to undertake yet a third analysis of the record, it would reach the same conclusion.

C. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' REQUEST FOR DISCOVERY.

As their second ground for seeking a writ of certiorari, plaintiffs suggest that the trial court erred in denying plaintiffs extensive discovery to uncover facts to support their specious claims of fraud on the court, and granting summary judgment. However, as described in the preceding section, after a detailed review of plaintiffs' specific factual allegations, Judge Peckham ruled,

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[11] Plaintiffs also decry the fact that the preliminary draft proposal, unlike the final agreement, did not expressly specify how much of the total funds available were to go to restitution and how much (subject to court approval) would be paid for attorneys' fees and expenses. The argument is ludicrous. Obviously the class attorneys were entitled to seek and receive substantial compensation, whether or not the settlement agreement specified a recommended amount. In fact, they could have requested and received more than two million dollars, which was a relatively small percentage of the total monetary benefit to the class. The fact that discussions between preliminary outline and final agreement led to segregating the sums does not show fraud or any other wrongdoing.

> "It is clear that even assuming the truth of all of these allegations, they do not establish fraud on the court." (CR 2164)

Plaintiffs now assert that they should have been allowed to conduct a fishing expedition to attempt to find some fraud on the court, even though none of the facts they sought to establish would constitute such a fraud.

The determination of whether these discovery requests should have been granted—like the determination of plaintiffs' underlying collateral attack claims—was a matter within the sound discretion of Judge Peckham. *H.K. Porter Co. v. Goodyear Tire & Rubber Co.,* 536 F.2d 1115, 1118-19 (6th Cir. 1976). *See also Kamm v. California City Development Co.,* 590 F.2d 205, 209-10 (9th Cir. 1975) (trial court did not abuse its discretion in denying discovery in connection with class action determination); *Porcelli v. Joseph Schlitz Brewing Co.,* 78 F.R.D. 499 (E.D. Wis.), *aff'd, without op.* 588 F.2d 838 (7th Cir. 1979). That discretion should be afforded even greater deference where, as here, the request for discovery was reviewed by the same judge who is claimed to have been defrauded. The exercise of that discretion already has been reviewed and approved by the Ninth Circuit, and plaintiffs suggest no reason why it should be reviewed again here.

Moreover, as Judge Peckham wisely noted, plaintiffs' request for discovery to aid in attacking and reopening a prior judgment must be evaluated with due regard for the vital importance of preserving—not undermining—the conclusiveness and protections of settlements and of final judgments. *H.K. Porter Co. v. Goodyear Tire & Rubber Co., supra,* 536 F.2d at 1118:

> [A] request for discovery for the purpose of attacking a final judgment involves considerations not present in pursuing discovery in a pending action prior to a judgment. Primary among these considerations is the public interest of the judiciary in protecting the finality of judgments.

In *H.K. Porter,* the court held that the trial judge had acted "well within his discretion" in denying post-judgment discovery to support a charge of fraud on the court where that charge was "founded on hope," not proof, and in requiring the moving party to make a specific evidentiary showing in support of its allegations before it would be afforded such discovery.[12]

Like the moving party in *H.K. Porter,* Valerio and Chang have presented no factual support for their serious accusation that a fraud was perpetrated on the court by the California Attorney General, District Attorneys, and more than twenty other lawyers. Instead, they demanded that the court provide them an opportunity to conduct a burdensome fishing expedition to search for proof. Judge Peckham correctly rejected that demand, for "no party to a proceeding may begin a new round of procedural attacks on a judgment without demonstrating good cause for those attacks.[13]

Furthermore, plaintiffs' discovery request was properly denied because Judge Peckham correctly determined in his discretion—and as a matter of law—that, labels aside, the "facts" plaintiffs alleged would be insufficient to show that the judgment was obtained by "fraud on the court." (CR 2163-64) Plaintiffs sought to initiate their massive discovery program for the purpose of finding and presenting evidence in support of their hindsight arguments that further investigations and different judgments should have been made by the *McCubbrey* attorneys, and to bolster their efforts to raise questions "as to the fairness of the settlement." Chang Br., 32. Such an attack is not a legally sufficient claim of "fraud on the court,"[14] and is one which plaintiffs simply do not have the right to make. Even when a person actually possesses "newly discovered evidence" which he believes should cause the court to reconsider and set aside a prior judgment (and which could not have been discovered previously by due diligence), the law limits to one year his time for requesting such relief, a period long since expired here. *See* Rule 60(b)(2), F.R.C.P. It would be anomalous in the extreme to grant plaintiffs the right, without time limitation, to seek to set aside the *McCubbrey* judgment on the basis of evidence which even yet they have not discovered, but would like the opportunity to seek. Yet that is the effect of their collateral attack and discovery requests.

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[12] 536 F.2d at 1119, 1122. Commenting on the trial judge's discretion, the court also observed that the judge who presided over the original proceedings was in a particularly good position to determine "whether the production of the documents which Goodyear claims Porter ought to have produced, or the alleged perjury, would have made any difference in his [original] holding. . . ." *Id.,* at 1122.

[13] *Id.,* at 1121. *See also Porcelli v. Joseph Schlitz Brewing Co., supra,* 78 F.R.D. at 501:

> [O]ne seeking to impeach an order of a court bears a heavy burden of particularized pleading and must offer to prove specific facts impugning the official record. [Citations omitted.] He must also satisfy the Court that he has substantial evidence of fraud which was not obtainable by due diligence prior to the time of entry of the order.

Plaintiffs' discovery requests only highlight how seriously their claims and approach in this litigation would subvert the vital interests in finality of judgments and settlement of litigation.[15] If plaintiffs' position were to be accepted, it would mean that any dissatisfied party or class member could assure that there be would be no such thing as finality of judgments. By the expedient of merely alleging that one or several of the great number of matters presented or arguably not presented to the court involved fraudulent misrepresentations or concealment, the post-judgment disputant or his lawyer could, as plaintiffs here seek to do, bombard other parties to the prior proceedings with extensive discovery seeking evidence relating to each alleged representation or nondisclosure, the knowledge of and investigations by counsel, all data and information evaluated in preparing the case and/or recommending settlement, and the details of settlement negotiations.

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[14] As stated by Judge Peckham:

> We seriously doubt that even the most liberal definition of fraud on the court would encompass the acts complained of and when that phase is given the narrow interpretation that our interest in finality of judgments requires, it is clear than (sic) even assuming the truth of all of these allegations, they do not establish fraud on the court. (CR 2163-64)

[15] "It hardly seems necessary to point out that there is an overriding public interest in settling and quieting litigation. This is particularly true in class action suits. . . ." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). *See also id.*, at 950 nn.11 & 12.

A final judgment or settlement ought to protect the parties and the judicial system from the burdens and expense of further litigation of claims which were or could have been raised in the original suit. If stratagems of the kind pursued by plaintiffs' counsel here were allowed to succeed, these benefits would be undermined and destroyed by the procedural burdens of defending the very litigation against which such protection is deserved.[16] Judge Peckham did not abuse his discretion in denying plaintiffs' unwarranted discovery requests.

D. PETITIONERS PRESENT NO REASONS WHY THIS COURT SHOULD CONSIDER THEIR NEWLY-RAISED ATTACK ON USE OF SETTLEMENT CLASSES.

In a last-ditch attempt to frame an issue which might attract the attention of this Court, petitioners argue that the procedure of certifying a class for settlement purposes should be prohibited—no matter how carefully the trial court has protected the interests of absent class members. *This argument is presented for the first time by petitioners in this petition, and was not argued to the trial court or the Ninth Circuit.*

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[16] These dangers are further illustrated by another, informal, discovery tactic pursued by plaintiffs' counsel in the trial court. Eight days after Judge Peckham had orally ordered a stay of all discovery, plaintiffs' counsel sent a form letter to thousands of lot-owners in the projects where Valerio and Chang own property. (CR 365) The letter mischaracterized the uncertified *Valerio* action as a "class action" brought on behalf of the property owners. It referred to alleged inadequacies in the *McCubbrey* settlement and requested that the recipient fill out an enclosed 4-page questionnaire (CR 367-70) "[i]n order to prevent the defendants from continuing to levy and collect assessments." (CR 365) The questionnaire primarily inquired about, and suggested the existence of, a large number of alleged misrepresentations made to lot-owners at the time of purchase—the same types of representations which had been alleged in the *McCubbrey* action. Judge Peckham, expressing dismay over this solicitation as a violation of the spirit of his discovery order and as contrary to earlier representations by Mr. Thayer (RT [June 23, 1977] 64:9-23), ordered that there be no further contact with purported class members without prior court approval. (CR 690) *See also* (CR 2197 n.17) The order specifically excepted any communications which the plaintiffs claimed were protected under the First Amendment to the United States Constitution. Further, the existence of plaintiffs' specific abuses were presented in evidence by affidavit. (CR 347-370) Thus, the order did not transgress this Court's recent ruling that "the mere possibility of abuses does not justify routine adoption of a communications ban that interferes with the formation of a class. . . ." *Gulf Oil Co. v. Bernhard*, _____U.S._____, 68 L. Ed. 2d 693, 705 (1981) The order here was issued only in response to an actual, serious abuse by plaintiffs.

Petitioners do not seem to take their own argument seriously. They cite no decisions which suggest that a settlement class may not be used under appropriate circumstances. They base their entire argument on the opinion of the editors of the Manual for Complex Litigation. But numerous courts have pointed out that the advice of the Manual is outweighed by the policy favoring fair settlements of all cases, including class actions. Further, the editors of the Manual sought to avoid problems which are not present here. The Second Circuit, after considering the recommendation of the Manual, approved a settlement class for reasons equally applicable here:

> "The settlement in the case at hand was not negotiated in the early stages of the dispute. Here, all the parties had been able to assess the risks of success after almost four years of litigation . . . nor was it a case in which defendants were in any position to play one would-be representative off against the other. . . .
>
> All of these reasons expressed in various ways, the Manual's dissatisfaction with the type of settlement which rested on a tentative acceptance of the class designation and was then ultimately forced upon the alleged class with an ultimatum that prevented any effective challenge to the settlement by simply giving class members the choice of accepting its benefits or litigating individually. The instant settlement contained no such harsh directive. Instead, it provided for notice of a hearing and an opportunity to challenge the fairness or any other aspect of the proposed settlement." *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 465-6 (2d Cir., 1974). *See also In re Armored Car Antitrust Litigation*, 472 F.Supp 1357, 1364 n.5 (N.D.Ga., 1979), *Modified on other grounds*, 645 F.2d 488 (5th Cir. 1981) *In re Beef Industry Antitrust Litigation*, 607 F.2d 167 (5th Cir, 1979), *cert. denied sub nom. Iowa Beef*

> *Processors, Inc. v. Meat Price Investigators Ass'n.* ___ *U.S.* ___, 69 L.Ed.2d 405, 101 S.Ct. 3029 (1981) *Brucker v. Thyssen-Bornemisza Europe, N.V.*, 424 F.Supp 679 (S.D.N.Y, 1976), *aff'd. without op. sub nom. Brucker v. Indian Head Inc.*, 559 F.2d 1202 (2d Cir.) *cert. denied sub nom. Rome v. Indian Head, Inc.*, 434 U.S. 897 (1977).

In the present case, as in the *City of Detroit* case, the Court provided a full fairness hearing and opportunity to object to the settlement. The settlement was not negotiated with one representative by playing him against other potential representatives. Rather, the settlement was approved by *all* the class representatives and attorneys after consolidation of all the pending actions under the *McCubbrey* umbrella. And, of course, the settlement was approved by the California Attorney General and the participating District Attorneys across the state.

Thus, this is not a case where use of a settlement class was open to abuse. Further, this issue was not raised in the lower court. Yet petitioners assert that "this court now unequivocally should disapprove that procedure." (Petition, p.20). This is simply not an appropriate case for this Court to consider such a sweeping attack on the procedures for settling class actions.

E. CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: November 12, 1981

Respectfully submitted,

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WEYMAN I. LUNDQUIST
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Opposition

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81-913

No. ....

Office - Supreme Court, U.S.
FILED
DEC 3 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1981

MICHAEL VALERIO, et al.,
Petitioners,
vs.
BOISE CASCADE CORPORATION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief in Opposition of Respondents Thomas Elke, Goldstein, Barceloux & Goldstein, Cotchett & Hutchinson, Lovitt & Hannan, Stark, Stewart, Simon & Sparrowe and Barfield, Barfield, Dryden & Ruane

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. How can a class member who participated in a class settlement without objection or appeal and collected his share of the settlement fund without making an effort to investigate the publicly recorded facts of the settlement, not be barred by the statute of limitations when he complains four years later that he had been led to believe he would receive a larger settlement than he in fact received?

2. Can Petitioners complain about the certification of a "settlement class" in the *McCubbrey* settlement when they did not object to the "settlement class" or appeal from the judgment settling the *McCubbrey* class action, but instead accepted the benefits of the settlement without complaint?

3. Can Petitioners complain about the use of the "settlement class" in the *McCubbrey* action when they never raised the issue at any prior stage of these proceedings?

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No. ....

In the Supreme Court of the United States

October Term, 1981

Michael Valerio, et al.,
Petitioners,
vs.

Boise Cascade Corporation, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

Brief in Opposition of Respondents Thomas Elke, Goldstein, Barceloux & Goldstein, Cotchett & Hutchinson, Lovitt & Hannan, Stark, Stewart, Simon & Sparrowe and Barfield, Barfield, Dryden & Ruane

INTRODUCTION

The Petition For Writ of Certiorari follows a unanimous opinion of the Ninth Circuit affirming the decision of the Federal District Court for the Northern District of California that plaintiffs' claims against these defendants are barred by the statute of limitations. A Petition For Rehearing and Rehearing En Banc was rejected without a single justice on the Ninth Circuit voting for rehearing. (See Appendix D to the Petition).

This Opposition to the Petition is filed by certain of the attorney defendants, as to whom the trial court disposed of Petitioners' charges with the following language:

> "The charge against the attorneys is extremely troublesome: not because it has any merit, but because it so obviously does not. It is difficult enough to believe that more than 20 respected members of the bar representing clients in six separate actions would conspire to defraud their clients and this court. The fact that the Attorney General and several district attorneys actively participated in the *McCubbrey* negotiations and settlement on behalf of all the district attorneys of California and the people of this state only serves to heighten our incredulity. An analysis of the allegations made against the attorneys confirms our belief that this charge of fraud on the court was unjustifiably and recklessly made. (C.R. 2162)

As will be shown in the body of this Opposition, allegations against the attorney-defendants continue to be recklessly and unjustifiably made. Contrary to the repeated mischaracterizations in the Petition, there was no "secret" rejection of a $74 million offer so that a $64 million offer could be accepted. In addition, Petitioners have improperly attempted to raise for the first time in their Petition matters which they never previously raised either in the prior action or before the District Court or the Court of Appeals in this action.

STATEMENT OF THE CASE

In 1973, several class action suits for fraud in the sale of recreational land against Boise Cascade Corporation and its subsidiary, Boise Cascade Home & Land, were consolidated into a single action, *McCubbrey v. Boise Cascade Home and Land,* and settled. The settlement was the result of months of negotiation under the supervision of the trial judge, the Honorable Robert F. Peckham. It produced a Settlement Agreement which was tentatively approved by Judge Peckham on March 9, 1973.

A Notice consisting of 47 pages and describing the proposed settlement in meticulous detail was mailed to all members of the class, including the two Petitioners here, on March 23, 1973. The Notice stated, among other things, that all present or former owners of recreational property purchased from Boise Cascade and Boise Cascade Home and Land were members of the class and that "therefore your rights will be affected by this litigation and settlement." (C.R. 197) The Notice described in detail the substance of claims alleged in the *McCubbrey* amended complaint. It also set forth the amount of the settlement funds and the manner in which payment of class members' claims would be calculated. (C.R. 202-206)

The Notice directed recipients to read the entire notice and stated that the settlement committee (with designated address and phone number) "is available to you if you have any questions or need any advice about any of the matters in this notice." (C.R. 197-198) It further advised class members that the documents concerning the actions, including the amended complaint and the full settlement agreement, were on file and available for inspection with the Settlement Committee and at the Court Clerk's office. (C.R. 198) It advised class members to "feel free to consult or retain an attorney of your own choosing . . . with respect to any of the matters in this Notice." (C.R. 198) Finally, the Notice stated that a hearing would be held on May 15, 1973, to consider the fairness of the settlement, to hear and rule on any objections to it, and to determine the amount of attorneys' fees and costs to be paid by Boise to the attorneys for the class. Anyone objecting to the settlement was invited to appear and make his views known at that time. (C.R. 207)

Although they admit receiving the Notice, neither Petitioner availed himself of the opportunity to review the Settlement Agreement, to consult with or retain his own attorney or to attend the fairness hearing. The fairness hearing itself was widely publicized and class members other than Petitioners attended the hearing with counsel. (C.R. 241 ff.) In addition, representatives of various public agencies, including the California Attorney General and district attorneys from 15 counties, attended the hearing and specifically endorsed and supported the settlement. At the hearing, the court heard testimony concerning the fairness and adequacy of the proposed settlement. (C.R. 241 ff.)

At the conclusion of the hearing, the court entered its final order and judgment, certifying the class, approving the settlement agreement and ordering that it be performed. (C.R. 318-320) The judgment expressly provided that it would be binding on all class members except those who mailed a request to be excluded from the class on or before June 26, 1973. Petitioners did not request exclusion. On the contrary, they filed claims and in the fall of 1973 received payments from the settlement fund of more than 17% of their alleged out-of-pocket losses.[1] As the trial court succinctly put it:

> "In sum, [Petitioners] did little more after receiving the Notice than to file their claims for restitution and to cash the claim checks that they subsequently received in the fall of 1973." (C.R. 2159)

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[1] Under the terms of the settlement, they were also permitted to keep their land in addition to receiving settlement payments. Future unpaid obligations to Boise Home & Land were also reduced by 17%. Finally, the settlement obligated Boise to complete some $14 million in improvements on the various developments and to expend approximately $17.4 million in administering and maintaining the developments.

Four years passed. During this time, assessments were levied on the property retained by Petitioners, the first occurring in November, 1973. (Valerio depo., 13) When Petitioners failed to pay these assessments, small claims court actions were filed against them by the association operating the developments. In March 1977 Petitioners went to their present attorney concerning the small claims court actions. They emerged from his office the named plaintiffs in a purported class action for $1.8 billion. The class action complaint was based primarily on plaintiffs' failure to receive as much in settlement as they claim the class attorneys had led them to believe they would get. The new action purported to reactivate the settled class actions and install plaintiffs' new counsel, Mr. Thayer, as class counsel for the 44,000 claimants whose claims had been settled by the *McCubbrey* settlement. It also purported to assert claims against the attorneys for the settling classes for legal malpractice and fraud.

The case was assigned to Judge Peckham. When Petitioners' counsel commenced solicitation of additional plaintiffs by letters and questionnaires which mischaracterized the pending action (C.R. 365-370), Judge Peckham ordered that there be no further contact with prospective class members without prior court approval.[2] In accordance with the recommendation of the Manual on Complex Litigation, Section 1.10, pp. 13-14, the court also directed that there be no discovery without court approval. (C.R. 2169, 2197-8, n. 17)

On July 7, 1977, certain of the attorney-defendants moved for an order dismissing the claims against them on the grounds that the amended complaint failed to state a claim for relief against them; that the claims against the attorney-defendants were barred by the statute of limitations; and that the claims against the attorney-defendants were barred by the doctrine of collateral estoppel. (C.R. 611) In their motion, the attorney-defendants requested, pursuant to Rule 12(b)(6), F.R.C.P., that the court consider matters outside the pleadings of the instant case (i.e., certain pleadings and proceedings from the *McCubbrey* case) and treat the motion as a motion for summary judgment under Rule 56, F.R.C.P. (C.R. 619) At the July 15, 1977 hearing, Petitioners' attorney joined in this request and concurred that the motion should be considered a motion for summary judgment under Rule 56 as well as a motion to dismiss under Rule 12. (July 15, 1977, R.T. 67:23-68:18) The court adopted the suggestion of counsel.[3]

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[2] Contrary to the suggestion at p. 8, n. 9 of the Petition, this Court's opinion in *Gulf Oil Co. v. Bernard*, ... U.S. ......, (1981) was brought to the attention of the Ninth Circuit when it unanimously rejected Petitioners' request for a rehearing en banc. It was presented to each justice on the Ninth Circuit by Petitioners' counsel by letter of June 11, 1981, appended hereto as Exh. A.

As each of plaintiffs' factual claims was shown to be false as a matter of public record, plaintiffs' counsel attempted to recharacterize their claims and persistently evaded requests by the court to specify the claims they were making.[4] In the face of plaintiffs' refusal to clarify their claims and their continued inability to explain their delay in bringing the action, the motions were taken under submission.

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[3] In their brief, Petitioners failed to inform this Court that they concurred in requesting the trial court to treat the motions as motions for summary judgment. Instead, they erroneously suggest that the trial court took this step without their concurrence. (Petition, pp. 8-9)

[4] At the July 15, 1977 hearing, the court specifically asked plaintiffs' counsel to identify the disputed issues and locate in the record facts relevant to those issues. (R.T. 143:8-9; 146:5-6; 147:13-1; 21:13; 148:12-14; 150:21; 151:5; 158:9-161:11; 164:4-166:12) Plaintiffs' counsel committed to provide a written statement, and August 1, 1977 was set as the date for filing such briefs. (R.T. 16:9-12) The pleadings filed by plaintiffs on that date, however, failed to specify the issues plaintiffs intended to raise by their complaint and failed to identify record references to support their position. (C.R. 913-920)

In November, 1977, while the motions for summary judgment were under submission, plaintiffs belatedly moved the court for leave to amend their suit to add a claim for fraud on the court. (C.R. 1616) After hearing argument, the court took this motion under submission and ultimately denied it in the course of granting the motions for summary judgment of all defendants. (C.R. 2191-2) As to the fraud and malpractice claims against the attorney-defendants, summary judgment was based upon the expiration of the statute of limitations. As to the belated attempt to add a claim of fraud on the court, Judge Peckham exercised his discretion to deny the motion to amend.[5]

Petitioners' appeal to the Ninth Circuit followed.

SUMMARY OF ARGUMENT

Summary judgment was rendered in defendants' favor on the grounds that plaintiffs' claims were barred by the statute of limitations. The Petition For Certiorari, however, makes only passing reference to the express reasons why neither the trial court nor any justice of the Ninth Circuit would allow plaintiffs to proceed. It nowhere even discusses whether plaintiffs' claims were timely asserted. Instead, in a transparent effort to attract this Court's attention, Petitioners have again changed their claims. They have raised questions which were not before the District Court, not before the Ninth Circuit and which, on this set of facts, cannot be presented to any court.

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[5] Petitioners on appeal did not raise the denial of their motion to amend their complaint to add claims of fraud on the court. They appealed from the grant of defendants' summary judgment motions, which were granted on statute of limitations grounds, and from the limitations on discovery imposed by the court.

Petitioners purport now, for the first time, to complain about the certification of the *McCubbrey* class for settlement purposes and suggest to this Court that this is an appropriate case to consider whether the "use of the 'settlement class' [should] be severely limited or prohibited entirely." (Petition, p. i) Whether or not the "settlement class" is a proper use of the class action mechanism is not raised by this case. Petitioners made no objection in the *McCubbrey* action to the certification of the class for settlement purposes, nor did they appeal from the final judgment. To the contrary, they participated without objection in the settlement and received their settlement payment, while keeping their property. Having neither objected to the procedure, nor appealed the final judgment, Petitioners are barred from asserting the use of the "settlement class" as a basis for overturning the settlement four years later. In addition, issues never raised at any other stage in these proceedings, will ordinarily not be considered by this Court.

The other questions Petitioners purport to raise are red herrings, predicated on misstatements of fact and distortions of the record. For example, Petitioners assert as though it were a fact that the attorneys for the class "secretly" rejected a higher settlement offer, which did not specify any amount for attorney's fees and costs, in preference for a lower one. As will be shown below, this assertion is untrue and, along with the other baseless claims against the attorney-defendants, was rejected in the strongest language by Judge Peckham (See p. 1, *supra*), whose opinion was adopted unanimously by the Ninth Circuit.

Regarding the court-imposed restrictions on discovery, the primary issue under the motion for summary judgment, already under submission to the court, was whether plaintiffs' claims were barred by the statute of limitations. Since the proposed "fraud on the court" claim was clearly an afterthought only before the court on a last minute motion to amend, the restrictions on discovery were within the sound discretion of the trial court, properly exercised by Judge Peckham.

In summary, Petitioners have created as "Questions Presented", questions which ignore the basis for the original summary judgment, which purport to raise issues which cannot be raised on these facts, and which purport to raise issues which Petitioners have never previously mentioned in these proceedings.

ARGUMENT

I. Having Participated in the Settlement Without Objection or Appeal, and Having Failed to Raise the Issue at Any Time in These Proceedings, Petitioners Cannot Complain About the Use of the "Settlement Class"

At page 10 of their Petition, Petitioners express amazement that neither the trial court nor the Ninth Circuit discussed the propriety of certifying a class for settlement purposes only. That amazement is disingenuous. Since Petitioners never raised the issue before either the trial court or the Ninth Circuit, it is hardly surprising that the "issue" was not discussed. More importantly, it is not an issue which can be raised here. Having neither objected to the procedure nor appealed from the trial court's judgment in the *McCubbrey* case, Petitioners have no standing to complain about the procedure some four years later after they cashed their settlement checks and enjoyed the other benefits of the settlement. See *Gentron v. Shastina Properties, Inc.*, 578 F.2d 1313 (9th Cir. 1978); and *Research Corp. v. Agnew Seed Co.*, 425 F.2d 1059 (7th Cir. 1970). Moreover, having never previously raised the issue in these proceedings, Petitioners would ordinarily not be permitted to present it for the first time to this Court. See, *e.g., Miree v. DeKalb County, Georgia,* 433 U.S. 25, 34-35, (1977) ("The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.") See also, *Adickes v. S. H. Kress & Co.,* 398 U.S. 144, 148 n.2, (1970).

II. There Was No "Secret" Rejection of a $74 Million Settlement Offer in Order to Accept a $64 Million Settlement

To state the "issue" is to recognize its absurdity. That more than 30 attorneys, including leaders of the San Francisco Bar, a deputy California Attorney General, and district attorneys from 15 counties, would reject a $74 million settlement in order to accept a $64 million settlement which included up to $2.5 million in attorneys' fees[6] and costs is absurd on its face.

To begin with, the "offer" referred to was not an offer at all. A review of the document described as an offer by Petitioners (See Appendix E to the Petition) shows that it was proposed as "an outline of [Boise's attorneys'] ideas for the proposed mechanics of settlement of the Boise cases" after substantial negotiations had already taken place. Moreover, when the outline of the ideas of Boise's attorneys (which underwent at least 16 formal revisions [C.R. 252:17-20]) is compared with the final settlement agreement (Appendix F to the Petition), the following emerges:

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[6] The cases cited by Petitioners at p. 13 of their Petition for the proposition that it is improper for the proposed settlement to include a provision for attorney's fees, are inapplicable here. Having failed to object to the award of attorney's fees and having failed to appeal from the judgment in the *McCubbrey* case, Petitioners are barred by the doctrines of collateral estoppel and statute of limitations from raising the issue four years later in a separate action.

1. Both documents provide for completion of improvements, as well as maintenance and administration of the developments. Although the October 20, 1972 outline prepared by Boise's attorneys estimated the value of these benefits to be approximately $42.5 million, compared to the estimate in the final agreement of $31.4 million (C.R. 2792-2793, Paragraphs E-1 and E-2), the actual benefits are described in identical terms. There is nothing whatsoever in the record to suggest that benefits included in the October 20, 1972 memorandum were excluded from the final settlement. Petitioners never purported to identify in any of their voluminous pleadings any such excluded benefit. The "difference" between the so-called $74 million offer and the $64 million final agreement is attributable to different estimates placed on the same benefits and to the fact that the estimates were made as of different dates. The estimate in the October 20, 1972 memorandum was made much earlier than the estimates included in the final agreement and was therefore likely to be less accurate. In addition, estimates made in October 1972 could not have reflected expenditures during the period between the draft proposal and the final agreement. (C.R. 2792-2793)

2. Regarding the funds made available for cash payments, reduction of note balances and payment of attorneys' fees and costs, a comparison shows the following:

	Draft Proposal of 10/20/72	Final Settlement Agreement
(a) Restitution Fund	$25.5 million, less costs, attorney's fees and expenses	$24 million (C.R. 2808-2809, ¶¶ G-5 and G-5-a)
(b) Costs, attorney's fees and expenses including public attorneys	To be determined by the court and subtracted from restitution fund. (Appendix E, p. 9)	To be determined by the court, not to exceed $2.5 million. (C.R. 2794-2795, ¶¶ E-3-a, E-4-B, E-4-c)

Thus, the total funds available to class members and to their attorneys was $26.5 million under the final settlement, compared to $25.5 million under the October 20, 1971 draft proposal.[7] Under the draft proposal, the restitution fund was to be first applied against unpaid balances due on notes. This would have meant no cash payments to any class members; the entire restitution fund would have been applied against unpaid note balances. By contrast, under the final settlement agreement, the restitution fund was applied pro rata against payments already made and against unpaid balances.[8] Thus, claimants participating in the final settlement received a cash award equal to 17% of their out-of-pocket payments, plus a 17% reduction in unpaid note balances. Given the time value of money, the allocation of the restitution fund in the final settlement agreement was clearly more beneficial to class members. In addition, under both the draft proposal and the final settlement, the claimants were permitted to retain their property, a fact nowhere mentioned in Petitioners' brief.

In summary, it does not require a financial expert to conclude that the final agreement was far more beneficial to class members than the draft proposal.

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[7] Petitioners gloss over the fact that under the October 20, 1972 draft, attorneys' fees and costs as determined by the court were to come out of the restitution fund and the amount of those fees and costs would likely have exceeded $1.5 million thus reducing the amounts available for class members. In any event, the final agreement benefited the class members by imposing an upper limit on the amount for which the attorneys would apply and by leaving the question of whether that amount should be reduced to the discretion of the court. The provisions covering attorneys' fees were fully disclosed in the Notice and in the Settlement Agreement. It is noteworthy that not one of the 44,000 class members, including Petitioners, objected to the fee request, or appealed the judgment.

[8] This benefit was cited to the court at the fairness hearing by Deputy Attorney General Linderman. (C.R. 262:4-18)

III. The Allegation of Fraud on the Court Does Not Affect the Dismissal of Claims Against the Attorney-Defendants as Barred by the Statute of Limitations

Although Petitioners' exposition of the law has always been unclear and subject to change, their arguments appear to be premised on the assumption that if they could prove fraud on the court, they would thereby breathe life into the claims against the attorney-defendants, which are barred by the statute of limitations. This premise, like many upon which the Petitioners rely, is false.

The doctrine of fraud on the court does not provide the basis of a claim for damages. If the district court had found fraud on the court, this finding would have permitted the court to set aside the *McCubbrey* judgment or to relieve plaintiffs from the effect of that judgment. Rule 60(b) F.R.C.P. It would have had no effect whatsoever on the time-barred fraud and negligence claims against the attorney-defendants. Thus, while a successful showing of fraud on the court could serve to reinstate the various actions that were consolidated and settled by the *McCubbrey* judgment, it could not resurrect the claims of fraud or malpractice upon which plaintiffs based their $1.8 billion claim against the attorney-defendants.[9] Those claims are barred by the statute of limitations and were properly dismissed by the trial court.

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[9] Petitioners understandably make no mention of the chaos that would result from thrusting 44,000 people back into litigation which, in light of appreciation in the value of recreational land in the tracts in question, would undoubtedly be unwanted by most class members. Nor do Petitioners discuss their failure to offer restoration of benefits received or the impossibility of restoring to Boise the monies and benefits received by all class members pursuant to the settlement, which is a prerequisite to a rescission claim and an attack on a class judgment. See, *Mungin v. Florida East Coast Rwy. Co.*, 318 F.Supp. 720, 735 (D.C.Fla. 1970).

IV. The Trial Court Was Not Obligated to Permit Discovery and Hold a Trial on the Merits Before Denying Plaintiffs' Motion to Amend Their Complaint to Add a Claim for Fraud on the Court

As with nearly all of Petitioners' claims, the claim of fraud on the court was an afterthought, thrown up by plaintiffs' counsel in an effort to stave off dismissal.[10] It was not included in the original complaint or the first amended complaint, but instead was offered by way of a Motion To Amend *after* the Motions To Dismiss and For Summary Judgment were under submission. The Motion To Amend was denied at the same time the Motions For Summary Judgment were granted. Thus, the issue with repect to the claim of fraud on the court was whether the trial court had abused its discretion in denying plaintiffs' last minute motion to amend. In this context, the court's decision not to permit discovery into the fraud on the court claim was a proper exercise of discretion.

Petitioners' citation of *Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238, (1944) for the proposition that there must be a trial whenever a claim of fraud on the court is raised and disputed is inapposite and demonstrates a misreading of *Hazel-Atlas.* In *Hazel-Atlas,* the question was whether or not the facts presented to the Circuit Court by affidavit entitled Hazel-Atlas to have granted its petition to the Court of Appeal for a bill of review. At that time (1944), even though Rule 60(b) was in effect, a claim of fraud on the court made after the Circuit Court's term had expired relating to a decision of the Circuit Court could only be reviewed as follows:

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[10] Similarly, the claim that counsel had "secretly" rejected a $74 million settlement to accept a $64 million was not included in the original complaint or in the first amended complaint. It was first raised in response to the Motions to Dismiss. The claim that the "class settlement" procedure had somehow prejudiced Petitioners' rights was never raised until the Petition For Writ Of Certiorari.

> "The hearing conducted by the Appellate Court on the Petition, which may be filed many years after the entry of the challenged judgment, is not just a ceremonial gesture. The petition must contain the necessary averments, supported by affidavits or other acceptable evidence; and *the appellate court may in the exercise of a proper discretion reject the petition, in which case a bill of review cannot be filed in the lower court.*" (Emphasis added) (322 U.S. at 248).

Thus, although the request for a bill of review had to be filed in the Court of Appeals, the review itself (i.e., an evidentiary hearing) would typically be held in the District Court. Whether such a review should be held at all, however, was a matter *within the discretion* of the Court of Appeals.[11]

In further elaboration on the procedures for handling petitions for bills of review, the dissenting opinion stated as follows:

> "On the question what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court, the authorities are not uniform. *Where the lack of merit is obvious, appellate courts have refused leave,* but where the facts are complicated it is often the better course to grant leave and to allow available defenses to be made in answer to the bill." (Emphasis added) (322 U.S. at 271.)

The portions of the opinion which Petitioners quote appear at first glance to support the proposition that if the facts upon which the claim of fraud on the court is based would be disputed by the party charged with fraud, a full-blown trial is required. A more careful reading of *Hazel-Atlas* shows, however, that although the person accused of fraud would be entitled to a trial, where the application to set aside the judgment for alleged fraud on the court appears to be without merit, the court may exercise its discretion to reject the application and not hold an evidentiary hearing. In the instant case, Judge Peckham determined that plaintiffs' claims were clearly without merit and he properly exercised his discretion by rejecting them.

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[11] In *Hazel-Atlas,* the Supreme Court held that since the affidavits were undisputed and fraud on the court was apparent from the affidavits, the Court of Appeals could decide the case (finding that there was fraud on the court) and simply direct the District Court to take action in accordance with its finding.

An almost identical question was raised in *H. K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115 (6th Cir. 1976). In that case, three years after the denial of its first Rule 60(b) motion, Goodyear filed a second Rule 60(b) motion and an independent action alleging fraud on the court asserting that Porter and its attorneys had wilfully failed to disclose certain documents during discovery. Goodyear requested post-judgment discovery in an effort to support its claim and to see if perhaps other documents had been concealed. The District Court in *Porter* held that before Goodyear could embark upon a new discovery program to fish for documents that were allegedly not discovered, Goodyear must make a prima facie showing of fraud. In finding that Goodyear had not made an adequate showing, the court held that mere allegations of nondisclosure were not sufficient to create a question of fact justifying discovery.

In affirming the decision of the District Court, the Sixth Circuit held that the scope of discovery is within the discretion of the trial judge and pointed out that:

> ". . . a request for discovery for the purpose of attacking a final judgment involves considerations not present in pursuing discovery in a pending action prior to a judgment. Primary among these considerations is the

> public interest of the judiciary in protecting the finality of judgments." (536 F.2d at 1118)

Like the Petitioners in the instant case, Goodyear complained that the district court abused its discretion in finding that Goodyear had shown no evidentiary basis warranting further discovery. The Sixth Circuit determined that once the district court concluded that Goodyear had shown no evidence of fraud there was no basis for ordering discovery. (536 F.2d at 1119)

As Judge Peckham correctly observed, the charge of fraud on the court in the instant case was made unjustifiably and recklessly and was raised for the first time in response to motions to dismiss. (C.R. 2171) The charge was not supported by any evidence, but rather was based on inferences which plaintiffs' counsel drew from his analysis of the financial pressures Boise Cascade and its subsidiaries were under in 1972 and early 1973. Although Petitioners have now relegated the issue to a long footnote, the essence of the fraud on the court claim that plaintiffs strenuously argued to the District Court and the Court of Appeals was this: The class attorneys, the district attorneys and the California Attorney General all believed the financial pressures on Boise Cascade and its subsidiary were real and seriously jeopardized a favorable and prompt resolution of the class members' claims if the settlement they had negotiated were not approved.[12] Plaintiffs' counsel, viewing the matter with vision clarified by four years of hindsight and clouded by ambitions of becoming class attorney for 44,000 claimants, disagreed. As Judge Peckham properly concluded, this difference of opinion does not constitute fraud on the court nor does the unsupported allegation that the attorney-defendants did not believe the statements they made to the court justify permitting plaintiffs to go on a fishing expedition in the hopes of developing facts that might support their claim.

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[12] If Boise's lenders had cut off funds to its subsidiaries, including Boise Home and Land, the completion and ongoing maintenance of improvements, which was one major benefit of the settlement, would not have occurred, to the detriment of many class members.

Apart from inferences drawn by plaintiffs' counsel, there was no evidence whatsoever that the attorney-defendants did not reach their conclusions in good faith. Under the circumstances, Judge Peckham was required to exercise his discretion, which he properly did in refusing to reopen discovery in this case to thrust 44,000 people back into litigation.

A complete analysis of the allegations and review of the record led Judge Peckham to the following conclusion:

> "As the court that presided over the *McCubbrey* settlement, we were in a position to study and consider closely the conduct of the attorneys and of the litigants in that action. We remain convinced that the representation provided there was of the highest quality and that the *McCubbrey* settlement: 'was an extraordinarily imaginative and resourceful resolution of a very complex and protracted matter and series of matters that have confronted many courts in the State and two federal courts. It has all of the ingredients of a settlement that neither side can be totally happy with, entirely happy with the results. It would not be a settlement if it were otherwise.' Hearing May 15, 1973 (R.T. 80-81.)" (C.R. 2172)

By reason of his personal involvement in every stage of the proceeding, Judge Peckham was in the best position to determine whether or not the attorney-defendants, the Attorney General, the district attorneys and Boise Cascade had perpetrated a fraud on his court. As the Sixth Circuit held in *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1122 (6th Cir. 1976):

> "The District Judge who presided over this protracted trial and who considered the evidence offered by Goodyear in support of its Rule 60(b) motion, did not believe that any fraud on the Court had been perpetrated on him. As an experienced trial judge he was in the best position to know."

See, also Atchison, T. & S. F. Rwy. Co. v. Barrett, 246 F.2d 849 (9th Cir. 1957).

After listening with infinite patience to the unsupported and constantly shifting accusations of plaintiffs' counsel, Judge Peckham determined that there had been no prima facie showing of fraud on his court and that the effort to set aside the *McCubbrey* judgment should be terminated. A review of the record supports him. There was no abuse of discretion and the Petition should be denied.

CONCLUSION

Petitioners' facility for twisting language and distorting the record is epitomized by the Conclusion to their Petition. The paraphrase of selected passages from the Seventh Circuit's opinion in *Milwaukee Towne Corp. v. Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951) has no application whatsoever to the instant case. There, the court was simply reducing what it thought to be an excessively large award of fees in an antitrust suit.

Even more tortured is the final paragraph in which Petitioners try to cast the attorneys who settled the *McCubbrey* case in the role of "spoilers" (presumably of the class action procedure for resolving large disputes). The term "spoilers" was originally and properly applied to disgruntled class members in *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1177 (9th Cir. 1977), who, after failing to opt out of the class, sought to spoil the settlement for the other class members. Judge Peckham adopted the language of the *Marshall* court in footnote 9 of his opinion, where he stated with respect to Petitioner:

> "If anything, the equities of the plaintiffs' position here are less than those of the appellants in *Marshall*. Not only did the plaintiffs here choose not to opt out of the settlement, but they did not appear at the fairness hearing, or appeal the court's approval of the *McCubbrey* settlement. And it was almost four full years after approval of the settlement that they filed this action seeking to play the role of spoilers for a class of approximately 44,000 people." (C.R. 2194-2195)

In its opinion in this case, the Ninth Circuit likewise labeled the Petitioners as "spoilers," quoting from *Marshall*. *Valerio v. Boise Cascade Corp.*, 645 F.2d 699, 700 (9th Cir. 1981).

Contrary to Petitioners' peculiar view of who are the "spoilers", denial of the Petition here will strengthen the class action solution to massive and complex litigation by giving permanence to settlements which have been approved without objection and implemented without appeal. It will advise class members (and counsel who would foment litigation) that if they have objections to the terms of a class settlement they cannot share in its benefits and then let four years go by without speaking up.

Dated: December 2, 1981.

Respectfully submitted,

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Exh. A

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June 11, 1981

Clerk, Ninth Circuit
Court of Appeals
Post Office Box 547
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Re: Valerio and Chang v. Boise Cascade Corp.
Nos. 79-4264 and 79-4241

Dear Sir:

On June 1, 1981, which was the day on which plaintiffs Valerio and Chang filed their Petitions for Rehearing and Suggestions for Rehearing En Banc in this court, the United States Supreme Court decided *Gulf Oil Co. v. Bernard,* No. 80-441.

Plaintiff Valerio referred to the fact that *Gulf Oil Co. v. Bernard* was pending in the Supreme Court at page 4, lines 7-21 of his abovementioned petition for rehearing.

Plaintiff Valerio encloses herewith twenty-five copies of this letter and of the slip opinion in *Gulf Oil Co. v. Bernard,* and hereby requests you to circulate them to the members of the court for their consideration.

Very truly yours,
ERNEST M. THAYER
Ernest M. Thayer

EMT:gt
Enclosures
cc: All counsel

Received/Counter
Richard H. Deane
Clerk, U.S.C.A.
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